RECEIVED
MAR 15 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

81 6382

NO.

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MALCOLM JOE DAVIS
Appellant

V.

STATE OF MISSISSIPPI
Appellee

ON APPEAL FROM THE SUPREME
COURT OF MISSISSIPPI

JURISDICTIONAL STATEMENT

F. KENT STRIBLING
309 Barnett Building
200 South President Street
Jackson, Mississippi 39201
(601) 948-5105

DIXON L. PYLES*
Pyles & Tucker
507 East Pearl Street
Jackson, Mississippi 39201
(601) 354-5668

*Counsel of Record

March 13, 1982

81 6382

SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 52,659

MALCOLM JOE DAVIS
Appellant

V.

STATE OF MISSISSIPPI
Appellee

NOTICE OF APPEAL TO THE SUPREME
COURT OF THE UNITED STATES

Notice is hereby given that Malcolm Joe Davis, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order affirming the judgment of conviction entered herein on December 16, 1981.

This appeal is taken pursuant to 28 USC §1257(2).

Dated: March 13, 1982

MALCOLM JOE DAVIS - Appellant

BY:
Of Counsel

F. KENT STRIBLING
309 Barnett Building
200 South President Street
Jackson, Mississippi 39201
(601) 948-5105

DIXON L. PYLES
Pyles & Tucker
507 East Pearl Street
Jackson, Mississippi 39201
(601) 354-5668

ATTORNEYS FOR APPELLANT

81 6382

iii

NO.

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MALCOLM JOE DAVIS
Appellant

V.

STATE OF MISSISSIPPI
Appellee

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MISSISSIPPI

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Appellant, Malcolm Joe Davis, moves the court for an order permitting him to proceed in this Court, in forma pauperis, with his appeal from the judgment of the

Supreme Court of the State of Mississippi, entered in this cause on December 16, 1981, pursuant to the provisions of 28 USC §1915, and Rule 46 of the Rules of this Court, and in support thereof attaches the affidavit of the appellant.

Appellant's statement as to jurisdiction is being filed with this motion and appellant's affidavit.

Dated: March 13, 1982

MALCOLM JOE DAVIS - Appellant

BY: _____
Of Counsel

F. KENT STIRLING
309 Barnett Building
200 South President Street
Jackson, Mississippi 39201
(601) 948-5105

DIXON L. PYLES
Pyles & Tucker
507 East Pearl Street
Jackson, Mississippi 39201
(601) 354-5668

ATTORNEYS FOR APPELLANT

81 6382

v

NO.

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MALCOLM JOE DAVIS
Appellant

V.

STATE OF MISSISSIPPI
Appellee

AFFIDAVIT IN SUPPORT OF MOTION FOR
LEAVE TO PROCEED ON APPEAL IN
FORMA PAUPERIS

I, Malcolm Joe Davis being first duly sworn, depose and say I am the appellant, in the above entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefor. That I believe I am entitled to redress.

I am presently confined in the Mississippi Penitentiary, pursuant to a sentence imposed after

conviction of rape in the Circuit Court of Pearl River County, Mississippi.

I was granted the right, by order of the state court judge, to proceed with my appeal to the Mississippi Supreme Court in forma pauperis.

My conviction was affirmed by the Mississippi Supreme Court. I seek to obtain a review on the merits by appeal to determine whether the criminal conviction should be reversed.

I further swear that the responses set forth below relating to my ability to pay the cost of prosecuting the appeal are true.

1. I am not presently gainfully employed.

2. I have not received, since March 8, 1979, any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source.

3. I do not own any cash, savings or checking account.

4. I am the father of three young children. However, because of my incarceration in prison, I am unable to provide any support for them.

I understand that false statements in this affidavit will subject me to penalties for perjury.

This affidavit is made in good faith.

A more detailed statement setting forth the grounds on which I believe I am entitled to a reversal of the conviction will be set forth in the "Jurisdictional Statement" to be filed on my behalf.

Malcolm Joe Davis
MALCOLM JOE DAVIS

SWORN TO AND SUBSCRIBED BEFORE ME, this the 4 day of March, 1982.

Jeff L. Porter
NOTARY PUBLIC

My Commission Expires:

My Commission Expires Jan. 23, 1985.

QUESTIONS PRESENTED FOR REVIEW

1. Is § 99-17-1 (1976) of the Mississippi Code Annotated (MCA) repugnant to the speedy trial provision of Amendment VI to the Constitution of the United States under the ruling of the Mississippi Supreme Court that the statute precludes the counting of 252 days of delay between arrest and arraignment despite the precedents of this court which require that all pretrial time (399 days) be counted because of the particular protection and rights of the federal constitutional speedy trial clause?

2. Is the appellant presumed to be denied his interests and rights under the speedy trial provision of Amendment VI when the trial court granted ex parte to the state a non-intrinsic delay of 147 additional days between arraignment and the trial because the district attorney elected to be with the grand jury and try no cases during the entire November 1979 term, and the state purposely failed and refused to utilize the services of the county attorney or envoke either of two state statutes [MCA §§ 25-31-21, 7-5-53 (1972)] to obtain additional prosecutorial assistants?

3. Were the appellant's rights to due process of law under Amendments V and XIV denied when the state courts admitted into evidence two "confessions" which the facts demonstrated were procured as the result of inducements, psychological coercion, and under circumstances contrary to the precedents established by this court?

4. Were the rulings of the Mississippi courts in violation of the appellant's Amendment V rights and contrary to the precedents of this court in Miranda v. Arizona and

Edwards v. Arizona when the two confessions were ruled voluntary and admissible despite the fact that they were obtained by continued questioning after the accused had exercised his rights to remain silent and have his counsel present during the custodial interrogation?

5. Did the Mississippi Supreme Court apply an erroneous standard for determining whether the appellant waived his right to have his counsel present during the 11:60 p.m. - 2:00 a.m. interrogation based solely upon a conclusion of the court that because appellant's counsel failed to appear on the afternoon of March 9, 1979, he waived the presence of counsel and willingly answered the questions of the sheriff?

6. Did the refusal of the trial court to grant a mistrial and the majority of the Mississippi Supreme Court to reverse the conviction because of the comment of the assistant district attorney during the initial summation to the jury "[t]hat all the defendant had to do at the time was to deny he committed the offense," and the explanation of the court that the prosecutor was referring to March 9 and 10, 1979, violate the rights of the appellant and Amendments V and XIV as the dissenting opinion stated?

LIST OF PARTIES IN MISSISSIPPI SUPREME COURT

The appellant, Malcolm Joe Davis, and the appellee, the State of Mississippi, were the only parties in the state trial and appellate court.

TABLE OF CONTENTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES..... i

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS... iii

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS..... v

QUESTIONS PRESENTED FOR REVIEW..... vii

LIST OF PARTIES..... ix

TABLE OF AUTHORITIES..... xii

CONSTITUTIONAL PROVISIONS..... xiv

STATUTES..... xiv

MISCELLANEOUS..... xiv

JURISDICTIONAL STATEMENT..... 1

OPINIONS BELOW..... 1

JURISDICTION..... 2

CONSTITUTIONAL PROVISIONS INVOLVED..... 3

STATUTE INVOLVED..... 4

STATEMENT OF CASE..... 4

Pretrial Proceedings..... 4

Proceedings During The Trial..... 7

Proceedings In The Mississippi Supreme Court. 10

The Mississippi Supreme Court Gave Validity to MCA § 99-17-1 (1976) Which is Repugnant to Speedy Trial Requirements of Amendment VI Because the Statute Precludes Counting 252 Days of Prearraignment Delay..... 10

Amendment V and the Precedents of the United States Supreme Court are contrary to the Decisions of the State Courts that the "Confessions" Were Voluntary and Admissible..... 12

Comments by Prosecutor and Court on the Appellant's Failure to Testify Violated His Amendment V Rights..... 15

Page

HOW THE FEDERAL QUESTIONS WHERE RAISED AND DECIDED IN THE STATE COURTS..... 21

THE FEDERAL QUESTIONS ARE SUBSTANTIAL..... 21

I. Davis' Amendment VI Right To Speedy Trial Was Denied By State Court Validation of MCA § 99-17-1 Which Precluded Counting 252 Day Delay Between Arrest And Arraignment..... 22

II. The Mississippi Supreme Court Declined To Follow the Precedents Established By This Court And Thus Deprived Davis Of His Rights Under Amendments V and XIV; Misapplied "Miranda" and "Edwards" In Upholding the Admission Into Evidence of Two Involuntary "Confessions."..... 32

III. The Majority Of The Mississippi Supreme Court Also Refused To Follow The Precedents Of This Court Relative To The Comments Of The Assistant District Attorney and The Interpretative Explanation Of The Trial Judge To The Jury On Appellant's Failure To Testify And Violated His Rights Under Amendment V..... 41

CONCLUSION..... 43

CERTIFICATE OF SERVICE..... 44

INDEX OF APPENDICES

Appendix	Description	Page
A	Reported opinion entered on December 16, 1981, 406 So.2d 795	1a
B	Unreported opinion entered on September 9, 1981	1b
C	Collected and unreported pages entered December 16, 1981	1c
D	Petition for Rehearing	1d
E	Motion to Dismiss because accused deprived speedy trial	1e
F	Reasons of trial judge for over-ruling motion to dismiss	1f
G	Motion For New Trial	1g
H	Assignment of Errors	1h
I	MCA § 25-31-21 (1972)	1i
J	MCA § 7-5-53 (1972)	1j

TABLE OF AUTHORITIES

Cases — Page

Ascraft v. Tennessee, 322 U.S. 143, 88 L Ed 1192, 64 S Ct 921 — 33

Atchison T. & S. F. T. Co. v. Public Utilities Comm'n (1953) 346 U.S. 346, 348-349 — 2

Barker v. Wingo (1972) 407 U.S. 514, 517, 519-21, 532, 533 — 24, 25, 26, 30, 31

Bitner v. State, 293 So. 2d 339, 341 (Miss. 1974) — 20

Blackburn v. Alabama (1960) 361 U.S. 199 — 33, 35

Brown v. Mississippi (1936) 297 U.S. 278 — 34, 35

Brown v. State, 340 So 2d 718 (Miss. 1976) — 17

Chambers v. Florida 309 U.S. 227, 240 — 32, 33

Cohen v. California (1971) 403 U.S. 15, 17-18 — 2

Coyote v. United States, (CA 10 1967) 380 F. 2d 305, cert. den., 19 L Ed 2d 484 — 36

Davis v. State, 406 So. 2d 795 (Miss. 1981) — 2, 18, 20, 32

Dickey v. Florida (1970) 398 U.S. 30-37-38, 51, 52, 53, 26 L Ed 2d 26, 31, 32, 90 S Ct 1564 — 25, 27, 28, 29

Dillingham v. United States (1977) 423 U.S. 64 — 22

Edwards v. Arizona (May 18, 1981) _____ US _____, 68 L Ed 2d 378, 101 S Ct 1880 — 13

Ferguson v. Boyd, (CA 4 1977) 566 F.2d 873 — 35

Goldblatt v. Town of Hempstead (1962) 369 U.S. 590 — 2

Hadley v. State (Wis 1975) 223 NW2d 461, 78 ALR 3d 273, 284 — 30

Hanrahan v. United States, 121 U.S. App DC 134, 139, 348 F.2d 363 368 (1965) — 28

Hedgepeth v. United States, 124 U.S. App DC 291, 294 and N. 3, 364 F.2d 684, 687, and N. 3 (1966) — 29

Hodges v. United States, 408 F.2d 543, 551 (CA 8 1969) — 25

Klopper v. North Carolina (1976) 386 U.S. 213, 222 — 22, 30

Lambert v. State, 199 Miss. 790, 25 So 2d 477 (1946) — 17

Lathrop v. Donahue (1961) 367 U.S. 820, 824-827 — 2

	Page
Lego v. Twomey (1972) 404 US 477	36
Lisenba v. California, 314 U.S. 219, 86 L Ed 166, 62 S Ct 280	33
Malinski v. New York (1945) 324 U.S. 401, 404	32
Miranda v. Arizona, (1966) 384 U.S. 436, 16 L Ed 2d 694, 86 S Ct 1602	15, 35, 36
Patterson v. State, 357 So. 2d 113, 115-117 (Miss. 1978)	16
People v. Troaut (1960) 54 Cal 2d 576, 80 ALR 2d 1418	35
Pollard v. United States 352 U.S. 354, 1 L Ed 2d 399	28
Prince v. State, 93 Miss., 46 So. 587 (1908)	17
Reck v. Pate (1961) 367 U.S. 433	33
Reddick v. State 72 Miss. 1008, 16 So. 2d 490 (1895)	17, 18
Rogers v. Richmond (1961) 365 U.S. 534	35
Smith v. Hooey (1969) 393 U.S. 607	23
Smith v. United States, 135 U.S. App. D.C. 284, 418 F.2d 1120, 1123, 1124 (1960)	31
State v. Pruitt (NC) 212 SE 2d 92	36
State v. Wallace (Wis) 207 NW 2d 885	36
State v. Watson (NM) 485 P. 2d 197	36
Strunk v. United States (1973) 412 U.S. 339, 340, 434	30
United States v. Lustman, 258 F.2d 475, 477-478 (CA 2 Cir 1958)	29
United States v. Mann, 291 F. Supp. 268, 271 (1968)	30
United States v. Marion (1971) 404 U.S. 307, 313, 316, 317, 92 S Ct 455, 30 L Ed 2d 468, 478	22, 27
United States v. Provoo 17 FRD 183 (DC Md), 350 U.S. 857	28
United States v. Ramsey (1977) 431 U.S. 606	23
United States v. Reed, 285 F. Supp. 738, 741 (DC DC 1968)	28
United States v. Wade (1967) 388 U.S. 218, 227	29
United States v. West, 504 F.2d 253, 256 (DC Cir 1974)	30, 31
Watts v. Indiana (1949) 338 U.S. 49, 54	34
Wilson v. United States (1896) 162 U.S. 626	33

Page

Constitutional Provisions

U.S. Const. amend. V passim
U.S. Const. amend. VI passim
U.S. Const. amend. XIV passim

Statutes

28 U.S.C. §1257(2) i, 2
28 U.S.C. §1915 iv
28 U.S.C. §2103 3
Miss. Code Ann. §7-5-53 (1972) 27, 31
Miss. Code Ann. §9-7-41 (1979) 6, 24, 26
Miss. Code Ann. §13-1-9 (1972) 17, 19
Miss. Code Ann. §25-31-21 (1972) 27, 31
Miss. Code Ann. §99-17-1 (1976) passim

Miscellaneous

American Bar Association Relating to Speedy Trial
Approved draft 1968; pp. 11-13 26
Approved draft 1971; pp. 112-113 26
Approved draft 1972; pp. 48-50 26
29 Am Jur 2d Evidense §550 36
Child, 10 Akron L Rev. 216, 262, 277 35, 36
Fed. Rule Crim. Proc. 48(b) 28
Jellinek, The Declaration of the Rights of Man and of Citizens (1901) p. 98 21
Jones, 29 Baylor L Rev. 1, 3, 4 36, 36-37
Lederer, The Law of Confession - The Voluntariness Doctrine, 74 Mil L Rev. 67, 76, 80-82, 85, 89 35, 36, 37
Dix, Mistake, Ignorance, Expectation, of Benefit, and Modern Law of Confession, 1975 Washington U L Q 275, 296-297 36
Rule 46 - Rules of Supreme Court iv

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MALCOLM JOE DAVIS
Appellant

V.

STATE OF MISSISSIPPI
Appellee

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MISSISSIPPI

JURISDICTIONAL STATEMENT

Appellant, Malcolm Joe Davis, respectfully seeks an appeal to review the final judgment and opinion of the Supreme Court of Mississippi entered on December 16, 1981.

OPINIONS BELOW

The modified opinion of the Mississippi Supreme

Court in Davis v. State, 406 So. 2d 795 (Miss. 1981), on Rehearing December 16, 1981, is reproduced in Appendix A. The unreported opinion of the Mississippi Supreme Court decided September 9, 1981, is reproduced in Appendix B. The corrected and unreported portions only of the September 9, 1981, opinion issued by the Mississippi Supreme Court are reproduced in Appendix C.

JURISDICTION

Jurisdiction of this court is invoked pursuant to 28 USC §1257(2). Cases sustaining the jurisdiction of this court are: Cohen v. California, (1971) 403 U. S. 15, 17-18; Atchison T. & S. F. R. Co. v. Public Utilities Comm'n (1953) 346 U. S. 346, 348-349; Lathrop v. Donohue (1961) 367 U. S. 820, 824-827; Goldblatt v. Town of Hempstead (1962) 369 U. S. 590. This appeal presents he question of the validity of Mississippi Code 1972 Annotated (MCA) §99-17-1 (1976) on the ground that this statute is repugnant to the appellant's rights pursuant to Amendments VI and XIV to the Constitution of the United States.

Appellant was arrested on March 9, 1979, and charged with rape. Trial was not begun until April 10, 1980, 399 days later and resulted in his conviction. Appellant moved, on April 3, 1980, to dismiss the indictment for failure of the court to give him a speedy trial in compliance with Amendment VI. Appellant's motion to dismiss was overruled. The trial court held MCA §99-17-1 (1976) was valid and that the statute was not repugnant to nor violative of Amendment VI.

On appeal, appellant's conviction and sentence were affirmed on September 9, 1981, by the Mississippi Supreme Court (App. B). One judge dissented and filed

an opinion holding that the conviction violated Davis' Amendment V rights. The appellant timely filed a petition for rehearing, reproduced as Appendix D. On December 16, 1981, the Mississippi Supreme Court modified its previous opinion, but denied the rehearing (App. A).

Timely notice of appeal to this court was filed in the Supreme Court of Mississippi on March ___, 1982. Since the Supreme Court of Mississippi expressly rejected appellant's challenge to MCA §99-17-1 (1976); and, otherwise ruled contrary to this court's decisions on the constitutional issues presented in this case, this matter is properly brought to this court by appeal.

In the event that the court does not consider the appeal the proper mode of review, appellant requests that the papers whereupon this appeal is taken be regarded and acted upon by writ of certiorari pursuant to 28 USC §2103.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Amendment XIV, Section 1 to the United States Constitution provides:

> "[N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any

> person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment V to the United States Constitution provides:

> "[N]o person. . .shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

STATUTE INVOLVED

MCA §99-17-1 (1976) provides:

"[I]ndictments to be tried within 270 days of arraignment.

> "Unless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after accused has been arraigned."

STATEMENT OF THE CASE

Appellant, Malcolm Joe Davis, was taken into custody and charged with rape on March 9, 1979 (A. 3a). He was indicted March 16, 1979. Thirteen months later on April 10, 1980, his trial was begun. At 3:00 a.m. on Sunday, April 13, 1980, the jury returned a verdict of guilty. Circuit Judge R. I. Pritchard sentenced the appellant to 30 years imprisonment.

Pretrial Proceedings

When the appellant was taken into custody his "Miranda" rights were read to him (A. 3a). He denied any knowledge of the rape and requested the presence of his attorney (R. 652, 653). An officer telephoned his lawyer in Hattiesburg, Mississippi. The attorney said

he would come to Picayune and confer with the accused (R. 655). Davis so informed the officers. Davis said: "I don't want to talk about it." (R. 643). However, the officers continued to question[1/] the appellant without the presence of his attorney.

During the continued interrogation following Davis' expressed desire to deal with the officers only through counsel, one of the interrogators promised the accused:

> "[i]f you talk to us. . .we'll cooperate with you every way we can. . .I told him it would be best. . .It would make it easier on yourself (R. 669, A. 4a)"

At 11:00 p.m. on March 9, 1979, the sheriff and an auxiliary deputy "[a]sked to have him (Davis) gotten out of the cell where we could talk with him" (R. 782). Appellant was again informed of his "Miranda" rights. He told the sheriff that his attorney was coming to confer with him. The sheriff wrote out three different confessions, and at the direction of the sheriff, the appellant signed his name to two of them, implicating himself in the alleged crime.

The grand jury indicted appellant on March 16, 1979, and the Pearl River Circuit Court set the case for call on March 26, 1979. Davis and his counsel appeared before the circuit judge. The court did not arraign the accused at that time because of its custom of refusing to arraign unless the case was to be tried during the term so as not to start the running of the 270-day period set up in §99-17-1. Davis' case was never scheduled to be tried during the March 1979 term, which began on March 12 and ended Sunday, April 22, 1979.

[1/] In the initial opinion released September 9, 1981, the Mississippi Supreme Court wrote "[N]o interrogation occured that afternoon. . ." (B. 4a). In the modified opinion the state court said: "[S]ome interrogation was continued that afternoon, but no prejudicial or incriminating statements were obtained from Davis. . ." (A. 3a).

On March 30, 1979, Davis filed the first of two motions to suppress the confessions alleging violation of Amendments V, VI and XIV to the United States Constitution, because the incriminating statements were made without counsel being present, at a time of great mental stress, and prior to his appearance before a magistrate.

On April 26, 1979, four days after the March 1979 term had ended, the court entered an order, on the motion of one of appellant's counsel, continuing the case to the November, 1979 term. The order was a nullity. It did not delay the trial.

The pertinent provisions of MCA §9-7-41 (1979) effective Frebruary 22, 1979, provides:

> "[T]he court terms in the Fifteenth Circuit Court district shall be as follows: . . .Pearl River County: On the second Monday of March for . . . (42) days and on the first Monday of November. . .(18) days each for both civil and criminal business. . ."

The 18-day, November, 1979 term of the Pearl River County Circuit Court began on Monday, November 5. The court set Davis' trial for November 16, 1979. The appellant moved for a special venire of jurors on November 7, and filed a list in the office of the clerk of 13 witnesses to be subpoenaed for the trial. On November 13, the district attorney moved ex parte and was granted a continuance to the April 1980 term for the trial of Davis. The non-intrinsic reason given for the delay was the state's lack of prosecutorial manpower, because "[n]o assistant district attorney was provided. . .(and) the District Attorney's presence was required. . .with the Grand Jury. . ."

On November 15, 1979, Davis' counsel appeared and objected, without success, to the delay. At the insistence of counsel, Davis was arrainged on that date.

(F. 2a-6a). On November 30, 1979, Davis' case was preset to begin on April 10, 1980.

On April 3, 1980, the appellant moved to dismiss the indictment and to be discharged because he had been deprived of a speedy trial guaranteed by Amendment VI as a result of the unreasonable delay (399 days) in bringing him to trial. The motion to dismiss is reproduced as Appendix E. On April 7, 1980, the trial judge considered and overruled the motion to dismiss. Set forth in Appendix F are the detailed reasons of the court which in effect justified the delay on the basis of MCA §99-17-1 (1976), which said for good cause two continuances were granted in this case.

Proceedings During
The Trial

During the trial the state offered into evidence the "confessions." The appellant objected on the ground that the incriminating statements were not voluntary because they were the product of duress, fear and compulsion. Davis' will was overbourne by his reaction to the psychological pressures on characteristics personal to him.

The state was under an evidentiary burden to prove "beyond a reasonable doubt" that Davis voluntarily made the incriminating statements and freely confessed to the crime charged in the indictment.

In an attempt to meet this burden the state, over objection, was permitted by a series of leading questions directed to the non-expert law enforcement officer to elicit testimony that the accused appeared to be "sane," "Unintoxicated" and "not drugged" when he was being interrogated.

The accused presented the uncontroverted expert testimony of Dr. Daniel Cox, clinical psychologist:

> "[I] don't think Malcolm Davis knew what he was doing.
> "A. I do not believe Malcolm Davis knew what he was doing when he signed those things. I don't think he was capable of making that decision without counsel. He had no counsel.
>
> "A. At the times Malcolm Davis was alleged to have signed those two documents it's my professional opinion that he would have signed anything simply to relieve the stress that he felt, the anxiety, the nature of his own disturbances. It was like a resolution of the conflict. He would have signed literally anything." (R. 592, 593, 850, 854)

The trial court overruled the objection of the appellant, and admitted the confessions into evidence. When the court admitted documents into evidence, the incriminating statements were given to the jury to read.

The district attorney caused a state witness to display before the jury certain articles and objects implying a connection with the alleged crime. After the prejudicial display the state announced that no attempt would be made to offer the items into evidence. The court overruled the appellant's objection and motion for mistrial. Other than the statement of the prosecutrix the state introduced no evidence to establish the corpus delecti of rape. There was no evidence that the prosecutrix surrendered because of fear arising out of a reasonable apprehension of great bodily harm. There was no evidence that she had had sexual intercourse on March 9, 1979. The excessive and inaccurate comments of the trial judge during the trial was a form of evidence which changed the factual matrix within which a jury customarily operates; structured a verdict of guilty; relieved the state of the burden of establishing "beyond a reasonable doubt" the charge in the indictment; and shifted to the appellant the burden of proving his innocence. The appellant moved to quash the

special venire on the ground that the panel as drawn was violative of his rights under Amendments VI and XIV. Appellant's statistical evidence demonstrated that the jury was not drawn from a representative cross section of Pearl River County. A disportionate number of jurors were drawn from the district wherein the prosecutrix lived.

Statements of the assistant district attorney[2/] and the interpretative remarks of the trial judge[3/] called the attention of the jury to the fact that the appellant had not testified and denied the offense with which he was charged. Counsel for the appellant objected and moved for a mistrial because the comment violated Davis' rights under Amendment V. The objection was overruled and the motion denied.

At the conclusion of the state's case, the appellant moved for dismissal and acquittal because the state had failed to meet its burden of proof. The court denied the motion.

The appellant timely filed his "Motion for New Trial," reproduced as Appendix G. Specifically set forth were charges that the trial court erred: in failing to dismiss and discharge the accused because of the violation of his right to a speedy trial accorded under Amendment VI; in admitting into evidence the "confessions" in violation of the accused' Amendment V rights, because the incriminating statements were not the voluntary acts of Davis, since

---

2/ Closing arguments are not customarily taken by the official court reporter. Appellant's counsel understood the assistant prosecutor to say: "[A]ll Malcolm Davis had to do was to come in here and deny he committed the offense."

3/ The trial judge ruled that the assistant district attorney said "[T]hat all the defendant had to do at that time was to deny he committed the offense." The court explained that the reference was to March 9, 1979.

he was mentally unable to resist the psychological pressures, and because of the promised leniency and reward if he would "talk" to the law enforcement officers; in failing to grant a mistrial because of the comments of the assistant district attorney on the appellant's failure to testify together with the interpretative remarks of the trial judge thereasto which were violative of Davis' Amendment V rights.

On April 21, 1980, the trial court overruled appellant's motion for a new trial. On May 23, the trial court entered its order allowing the appeal in forma pauperis.

Proceedings In the Mississippi Supreme Court

The federal questions in this appeal were presented in the Mississippi Supreme Court. The manner in which the questions were raised and the disposition thereof are set forth herein under the separate sub-headings.

The Mississippi Supreme Court Gave Validity to MCA §99-17-1 (1976) Which is Repugnant to Speedy Trial Requirements of Amendment VI because the Statute Precludes Counting 252 Days of Prearraignment Delay

The Mississippi Supreme Court rendered its original opinion (App. B) on September 9, 1981. The appellant filed a petition for rehearing (App. D) challenging the factual finding and conclusions of law. The state court rendered a modified opinion on December 16, 1981, wherein it charged some of the original findings but nevertheless denied the rehearing (App. A). The opinions of the Mississippi Supreme Court violated Davis' right to a speedy trial when it upheld the validity of MCA §99-17-1 (1976) which is repugnant to his rights under Amendment VI (App. A).

The Mississippi Supreme Court points out in the opinions (App. A, B) that

> "[D]avis contends the trial court failed to grant a speedy trial, violating his Sixth Amendment rights . . .asserts undue delay from the time of the indictment, March 16, 1979, to the time of arraignment, November 15, 1979, and to the time of the trial, April 10, 1980. . .
>
> "[D]avis filed a motion to dismiss the indictment based on the state's failure to bring him to trial within the 270 day time period of MCA §99-17-1 (Supp. 1980). This motion was overruled because the delay was the result of continuances granted.
>
> "[W]e are of the opinion there was not untimely delay between arraignment and trial date. . .
>
> "[t]he time prior to arraignment is not computed to determine compliance with this statute. . . (Emphasis added)
>
> "[t]he delay. . .is not unreasonable in view of the fact the court below has two terms of criminal court each year, March and November terms. Defendant cannot be heard to complain about the first continuance from March 1979 to the November 1979 term because defense requested it to complete psychological tests of defendant. The state requested and was granted the continuance from the November 1979 term to the March 1980 term. . .the continuance, in our opinion, was not unreasonable because the trial court found the District Attorney was required to be before the grand jury the entirety of that term. We. . . think both continuances were necessary and reasonable. . .and surely not violative of MCA §99-17-1 (Supp. 1980) which permits continuances for good cause. . .
>
> "[W]e . . .are of the opinion the delay did not infringe on Davis' constitutional right to a speedy trial.
>
> "[W]e are unable to state there was error in not dismissing the indictment. . .there was some testimony that appellant's incarceration contributed both to his mental and physical deterioration, it was not conclusive on the trial judge as he had other factors to consider in conjuntion with it, such as appellant's physical appearance and demeanor, testimony of deputies and the sheriff as to appellant's mental and physical condition. . .the appellant's right to a speedy trial was not violated" (App. A 4a, 5a, B 4a-6a) (Emphasis supplied)

The decision of the Mississippi Supreme Court (App. A) squarely rejected the appellant's assignment of error reproduced as Appendix H that

> "[T]he failure of the court to grant the defendant a speedy trial violated his constitutional rights under Amendment VI, which is made obligatory on the state by Amendment XIV; aggravated his mental condition because of the prolonged incarceration prior to his trial was unduly oppressive; maximized his anxiety and concern which accompanied the public accusation of the appellant; and greatly impaired his ability to defend himself." (App. H)

The Mississippi Supreme Court ruled that the 252 days from March 9 (date of arrest) to November 15, 1979, (date of arraignment) could not be computed as a part of the 270-day limit under MCA §99-17-1 (1976). The 147 days from November 15, 1979, to April 10, 1980, (the date when the trial began) were the only days the state courts considered under §99-17-1.

Appellant contended and argued in the state courts that each of the 399 days, between the arrest and the commencement of the trial, are required under Amendment VI to be counted as a part of his rights to a speedy trial. To exclude the 252 days is to give validity to MCA §99-17-1 which is repugnant to Amendment VI to the Constitution of the United States.

Amendment V and the Precedents of the United States Supreme Court are Contrary to the Decisions of the State Courts that the "Confessions" Were Voluntary and Admissible

The appellant assigned as error (App. H 2a) the admission into evidence by the trial court of two signed confessions:

> "[T]he procurement, use and admission into evidence of the several involuntary confessions deprived the defendant of the essential elements of due process

> guaranteed by Amendment V; of the right to effective assistance of counsel in violation of Amendment VI. . ."

The Mississippi Supreme Court conceded it found troublesome two aspects of the admission into evidence of the incriminating statements

> "[W]hether they were voluntarily given and whether there was an intelligent waiver of counsel. . . (A 5a)

> "[T]he circumstances of this case parallel rather closely the facts of Edwards[4/] . . .Both cases concern a second police-initiated interrogation. . .Davis reported to the officer that the attorney would come to the sheriff's[5/] office that afternoon and confer with him; however, the attorney did not come to the sheriff's office and confer with Davis that date except in the telephone conversation. Some nine hours later the sheriff and a deputy talked with Davis and obtained the confession. Davis told the sheriff he had spoken to his attorney, but he was still willing to talk to the sheriff at that time. We conclude that after Davis' counsel failed to appear in the afternoon, he willingly waived the presence of counsel and willingly answered questions of the sheriff. . ." (A. 6a) (Emphasis supplied)

The conclusion of the state appellate court has absolutely no basis in fact. Davis never willingly waived the presence of counsel nor did he willingly answer questions. The Mississippi Supreme Court declined to give effect in Davis' case to the legal principles clearly spelled out

---

4/ Edwards v. Arizona (May 18, 1981) _____ US _____, 68 L. Ed 2d 378, 101 S. Ct 1880

5/ Davis did not report that the attorney would come to the sheriff's office. Although the statement is minor in importance to the issues involved, the statement does demonstrate the cavalier manner in which the Mississippi Supreme Court treated the detailed facts. Davis reported that the attorney would come to the Criminal Justice Center in Picayune approximately 50 miles southwest of Hattiesburg. The sheriff's office is located in Poplarville, 30 miles southwest of Hattiesburg.

in Edwards to the effect that having exercised his right at 1:55 p.m. to have counsel present during interrogation the appellant did not validly waive that right during the 11:00 p.m. - 2:00 a.m. interrogation.

The misleading factual statements of the Mississippi Supreme Court is again demonstrated:

> "[S]heriff Holliday testified Davis did not make a request to contact his attorney, explaining as follows: 'Whenever I read his rights, and he signed the waiver of rights, he told me that he had spoken to his attorney, but he was still willing to talk to me.'" (A. 4a)

The record presents a different picture. At no time did Davis ever tell the sheriff he was willing to talk to the officer. The sheriff "[j]ust started talking to him about things in general" (R. 525). The statement in the opinion that Davis was willing to talk to the sheriff about things in general does not support the conclusory statement that the appellant was willing to talk to the sheriff about the alleged crime.

The factual differences in the Edwards and Davis cases are so minute as to not to be distinquishable in the application of the legal principles. Davis never voluntarily waived the presence of his counsel at any time; he never abandoned nor relinquished any right or privilege. As in Edwards the Mississippi Supreme Court applied an erroneous standard for determining Davis' right to counsel by focusing on the voluntariness of the two confessions rather on whether he understood his right to counsel and intelligently relinquished that right. Both the trial and appellate courts illegally and arbitrarily ignored the uncontroverted testimony of Dr. Cox that Davis did not know what he was doing when he signed the waiver of rights and the two confessions, because he was incapable of making the decision without counsel and he had no counsel present.

Davis invoked his right to have counsel present at 1:55 p.m. on March 9, 1979, to advise him during the

custodial interrogations. The valid waiver of that right was not and could not be established by the mere "conclusion" of the state appellate court judges that just because the lawyer did not come to the "sheriff's office" on the afternoon of March 9, that Davis waived his right to have counsel present. The mere showing that he responded to the police-initiated interrogation after being again advised of his rights was not sufficient in Edwards nor in Davis to validate the confessions. The use of Davis' "confessions" against him at the trial violated his rights under Amendment V and XIV to have counsel present during every phase of custodial interrogation. Once Davis expressed his desire to deal with the law enforcement officers only through counsel, the sheriff could not legally further interrogate him unless counsel was present as required by Miranda v. Arizona, (1966) 384 U.S. 436, 16 L. Ed 2d 694, 86 S. Ct 1602, unless the appellant himself initiated further communication, exchanges, or conversation with the law enforcement officers, i.e., an actual overture by Davis toward the sheriff. This the appellant did not do.

Davis' rights under Amendments V and XIV were violated in the same manner as were the rights of Edwards.

Comments by Prosecutor and Court on the Appellant's Failure to Testify Violated His Amendment V Rights

The appellant had a consitutional right to remain silent. Permitting the prosecution to use that right as a weapon to convict him violated Davis' rights under Amendment V and made applicable to Mississippi under Amendment XIV. The guarantee against self-incrimination of Amendment V forbids either comment on Davis' failure to testify made by the assistant district attorney, or the clairvoyant perceptive explanation of the remarks

by the trial court of the meaning of the statements which the trial judge made to the jury.

The Mississippi Supreme Court, as far as can be ascertained, refused for the first time in its long history to follow the unbroken line of cases which reverse and remand for remarks made by the state's attorney on the failure of the accused to testify. Patterson v. State, 357 So. 2d 113, 115-117 (Miss. 1978).

In refusing to condemn the comment of the assistant prosecutor, the Mississippi Supreme Court indulged in unjustified assumptions, resorted to the conclusion of justification which the court speculated was in turn evoked by the fact that Davis first denied his participation in the alleged crime and later confessed.

In upholding the trial court's failure to grant Davis a mistrial on the argument of the assistant district attorney, the Mississippi Supreme Court said:

> "[T]he appellant also contends it was reversible error because the trial court refused to grant a mistrial when the assistant prosecutor in the closing argument was allowed to comment on the failure of the defendant to testify in his own behalf. Since defense counsel did not preserve the closing argument for the record[6] or by a bill of exceptions or otherwise, we must assume the court's ruling in this regard is correct. The trial court dictated into the record[7] the following:
>
> 'Let the record show that the Assistant Attorney was arguing the case, and in his argument of speaking of the times that the statements were made by

---

6/ There is no provision in Mississippi statutes for closing arguments to be taken and preserved in the record by the court reporter.

7/ The statements of the court were made in the presence of the jury.

> defendant and in reference to those statements, he made the statement that all the defendant had to do at that time was deny he had committed the offense. Upon him stating that, the defense attorneys have now moved the court for a mistrial. The court finds that the statements made by the Assistant District Attorney were made in the 9 March, 1979, and in the early morning of 10 March, 1979, and in conjunction with the statements that were made to the Sheriff and other witnesses at said time and place and were not in any manner referring to any other time, place, circumstance or situation, for this reason, the motion will be overruled.'
>
> "[I]f the attorney's statement could reasonably be construed by the jury as a comment on Davis' failure to testify, then it would be immaterial that the attorney intended to refer to a situation other than the trial-in-chief. Reddick v. State, 72 Miss. 1008, 16 So. 2d 490 (1895).

In the dissenting opinion the state Supreme Court judge said:

> "[M]ississippi Code Annotated §13-1-9 (1972) requires, and this court has held in numerous decisions, that no comment whatsoever shall be made upon the defendant's failure to testify in a case. We have gone further and held no comment can be made which could be construed by the jury as a comment on the failure by the accused to testify. Brown vs. State, 340 So. 2d 718 (Miss. 1976), Lambert v. State, 199 Miss. 790, 25 So. 2d 477 (1946), Reddick v. State, 72 Miss. 1008, 16 So. 490 (1895).
>
> "[A]s this court said in Prince v. State, 93 Miss., 46 So. 587 (1908), the jury cannot avoid being keenly cognizant of the defendant's failure to testify, and the defendant being manifestly the one person most interested in the outcome, the jury can only wonder why he did not testify. To make any kind of comment that can be construed as a statement to the jury as 'Well, if he is not guilty, he could have denied it,' can only result in serious prejudice to the defendant's statutory and constitutional rights under the Fifth Amendment to the Constitution.

"[T]he Court stated in pertinent part:

> '. . .The Assistant Attorney was arguing the case, and in his argument of speaking of the times that the statements were made by the defendant and in reference to those statements, he made the statement that all the defendant had to do at that time was deny that he committed the offense.'
>
> "[F]or twelve jurors under those circumstances to restrict their thoughts solely to the defendant's statements to the law officials, and not also instantly be alerted by this comment the defendant could have denied his guilt as a witness from the witness chair, each would first require a lobotomy. In my view the statement by the assistant prosecutor can only be construed as a comment on the failure of the defendant to testify . . .I think the inference inescapable and unavoidable. (A 9a, B 14-15a) (Emphasis supplied)

The trial court found that the assistant district attroney said in his argument to the jury

> "[t]hat all the defendant had to do at that time was to deny that he committed the offense." (Emphasis supplied)

The majority of the Mississippi Supreme Court said they had difficulty in determining the prejudicial effect of the statement on the jury's verdict (A 7a). The majority "assumed" the trial court properly resolved the question.

Abandoning the historic rule which it announced in Reddick v. State, cited supra, and which it has followed without exception since 1895, the majority of the Mississippi Supreme Court in Davis v. State on the basis of conjecture alone, in the total absence of facts, reached the conclusion that the assistant district attorney was frustrated and perhaps mesmerized by the fact that Davis first denied his participation in the crime and when he was promised leniency, suffered coercion, had his will overbourne, he involuntarily signed two confessions, thereby forfeiting his rights under Amendment V which permitted the prosecutor

to call the jury's attention to the fact that Davis did not testify.

Perhaps most amazing of all, is the statement of the majority of the Mississippi Supreme Court as a justification for denying Davis his constitutional rights:

> "[N]or do we have, as did the trial court, the benefit of defense counsel's argument which might have prompted the comment of the assistant district attorney in reply." (A 7a) (Emphasis supplied)

When the assistant district attorney made the offending comment he was making the prosecutions' opening summation. The defense counsel had not argued to the jury. As far as is known no judicial tribunal in the United States has ever held that the argument of defense counsel would provide the prosecution with license to suspend Amendment V and MCA §13-1-9 (1972) and comment to the jury on Davis' failure to testify.

"Consistency" is not a "jewel" in the Circuit Court of Pearl River County nor in the Supreme Court of Mississippi. For the trial court said the assistant prosecutor argued "[t]hat all the defendant had to do at that time (March 9 and 10, 1979) was deny he commited the offense." On March 9, the law enforcement officers read Davis a statement of the "Miranda" rights in the following language."

> "[Y]ou must understand your rights before we ask you any questions.
> "[Y]ou have the right to remain silent.
> "[A]nything you say can be used against you in court, or other proceedings.
> "[Y]ou have the right to talk to a lawyer for advise before we question you and have him with you during questioning. . . ." (R. 327, 608). (Emphasis supplied).

Davis denied any knowledge of the rape and requested the presence of his attorney, and stated he didn't want to talk.

"Miranda" requires that Davis be told that he has the right to remain silent and no derogatory inference can be drawn from his silence. The Mississippi Supreme Court in Davis v. State told the appellant that if he initially remains silent, the state may take away his rights under Amendment V and call the jury's attention to the fact that he has not testified.

> "[t]o draw a derogatory inference from mere silence is to compel the respondent to testify; and the customary formula of warning should be changed, and the respondent should be told, 'if you say anything, it will be used against you; if you do not say anything that will be used against you.'" Bitner v. State, 293 So. 2d 339, 341 (Miss. 1974).

The Repugnance of §99-17-1 to Amendment VI Was Again Demonstrated When the Mississippi Supreme Court Upheld the Validity of the State Statute Following Appellant's Petition for Rehearing

The question of the validity of MCA §99-17-1 on the ground that the state statute was repugnant to Amendment VI was again presented to the Mississippi Supreme Court on October 8, 1981, in paragraph 10 of the Petition for Rehearing (App. D 4a-5a)

> "[T]he Mississippi Supreme Court erred in the September 9, 1981, decision in
> "(a) refusing to hold the delay of 399 days between Davis' arrest and the beginning of his trial violated his Sixth Amendment right to a speedy trial
> "(b) failing to hold that MCA §99-17-1 under the circumstances existing in this case is unconstitutional on its face and as applied."
> "(c) holding that the failure of Pearl River County to have a prosecuting attorney available at the November, 1979 term in a timely manner justified a continuance "for good cause. . .
> "(d) refusing to hold that the delay of 399 days between arrest and trial gave prima facie merit to Davis' challenge to the lack of a speedy trial
> "(e) refusing to hold from the uncontradicted evidence of the psychological expert that Davis' incarceration contributed to his 'mental and physical con-

> dition' and in accepting the lay testimony of law enforcement officers elicited by leading questions that the appellant appeared 'normal.'" (D 4a-5a) (Emphasis supplied)

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED IN THE STATE COURTS

The appellant properly raised the federal questions presented for review in this court as shown in the "Pretrial Proceedings" (pp. 4-7), "Proceedings During the Trial" (pp. 7-10) and "Proceedings in the Mississippi Supreme Court" (p. 10). Since the appellant set forth in the above named portions of this "Jurisdictional Statement" the method by which the federal questions were raised and the disposition thereof in each instance contrary to the rights of the appellant, it is not deemed appropriate nor necessary to repeat the details in this portion of the appeal.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

Individual citizen Malcolm Joe Davis, by this appeal, seeks to have the United States Supreme Court, as the ultimate umpire, reconcile and adjust the true boundaries between his individual rights with those of the State of Mississippi. The federal constitutional questions presented in this appeal are substantial, in that the issues are of real worth and importance to the appellant and to society as a whole. The making of the reconciliations and adjustments between the individual and the local governments "[i]s the highest problem that thoughtful consideration of human society has to solve."[8/]

8/ Jellinek, The Declaration of the Rights of Man and of Citizens (1901) p. 98.

In this portion of the "Jurisdictional Statement" Davis demonstrates that his rights under Amendments V, VI and XIV were ignored by the state.

I.

Davis' Amendment VI Right To Speedy Trial Was Denied By State Court Validation of MCA §99-17-1 Which Precluded Counting 252 Day Delay Between Arrest And Arraignment.

The Sixth Amendment to the Constitution of the United States guarantees to all persons a "speedy trial" in criminal prosecutions by the federal government. In 1967 this court ruled that an accused's right to a speedy trial protects a fundamental right and is made obligatory upon the states, including Mississipppi, under the due clause of Amendment XIV. Klopper v. North Carolina (1967) 386 U.S. 213, 222.

From the time of his arrest on March 9, 1979, Davis has remained in prison. Amendment VI was applicable to the appellant on the above date for then he became an accused. The computation of time under MCA §99-17-1 does not begin until arraignment. Under Amendment VI the time begins to run when "[t]he putative defendant in some way became an 'accused.'" United States v. Marion (1971), 404 U.S. 307, 313, 316, 317. Justices Douglas, Brennan and Marshall in a concurring opinion indicated the right to a speedy trial applied to pre-indictment stages of the Marion case. "[t]he actual restraints imposed by arrest and the holding to answer a criminal charge. . .engage the particular protection of the speedy trial provision of the Sixth Amendment." Dillingham v. United States (1977), 423 U. S. 64. "[t]he actual restraints imposed by arrest and holding to answer a criminal charge" engage the right and protections of the speedy trial provisions

of Amendment VI. United States v. Ramsey (1977), 431 U.S: 606.

Under Amendment VI the 252-day period between the arrest on March 9, and the arraignment would have counted in the delay. Under MCA §99-17-1 the Mississippi Supreme Court effectively held that Amendment VI and its speedy trial guarantees are displaced by the state statute. MCA §99-17-1 is repugnant to Amendment VI relative to the starting point for counting time.

In Smith v. Hooey (1969), 393 U.S. 607, this court observed with reference to the speedy trial right:

> "[t]his constitutional guaranty has universally been thought essential to protect at least three basic demands of criminal justice in the Anglo-American legal system: '[1] to prevent undue and oppressive incarceration prior to trial, [2] to minimize anxiety and concern accompanying public accusation and [3] to limit the possibilites that long delay will impair the ability of an accused to defend himself.'"

The state court held that the 147 days subsequent to the arraignment and the commencement of the trial was not unreasonable: (1) because the trial court "[h]as two terms of criminal court every year, the March and November terms" (A 4a); (2) because Davis cannot be heard to complain about the continuance from March to November, 1979, for the defense requested it to complete psychological tests of defendant; and (3) because the state requested and was granted a continuance from the November 1979 term to the April 1980 term "[b]ecause the trial court found the District Attorney was required to be before the grand jury the entirety of that term and there was no assistant district attorneys to try the case at this term." (A 4a).

The Mississippi Supreme Court chose to ignore the facts concerning the request of appellant for a continuance to the November 1979 term. As set forth hereinbefore (p. 6) the Mississippi Legislature by an act effective

February 22, 1979, amended MCA §9-7-41 to provide that the March 1979 term of the Pearl River Circuit Court should begin on the second Monday of March (March 12, 1979) and continue for 42 days (April 22, 1979). On April 26, 1979 four days after the term ended the trial court entered an order (R.20) continuing the Davis' case to the November 1979 term. The April 26, 1979 order did not delay the trial of Davis. The state had never set Davis' trial during or for the March 1979 term. The order was a complete mullity as it concerned a continuance. The Davis' case was automatically continued by operation of law when the term ended without a trial. The Mississippi Supreme Court may have confused the order (R. 16) of the trial court dated April 5, 1979, to transfer the defendant to Hinds County for the purpose of having him examined by a psychologist and psychiatrist.[9/]

The Mississippi Supreme Court contends that the 252-day delay from March 9 to November 15, 1979, should be "a continuance duly granted by the court" should be charged against the appellant and constitutes a waiver, pro tanto, of the right to a speedy trial.

Even if the facts demonstrated that Davis asked for a delay to prepare his own case, it cannot constitute a waiver of his right to a speedy trial. It cannot be interpreted as a wilful delay of the trial or be used by the Mississippi Supreme Court as a "good cause" to circumvent Davis' constitutional right to a speedy trial. Barker v. Wingo (1972), 407 U.S. 514, 517.

> "[T]he nature of a speedy trial does make it impossible to pin point a precise time in the process when the

---

9/ It is unlikely that the Mississippi Supreme Court confused the order dated August 8, 1979, to have Davis examined by Dr. George Wilkerson, psychiatrist in Hattiesburg.

> right must be asserted or waived, but that fact does not argue for placing the burden of protecting the right solely on defendants. A defendant has no duty to bring himself to trial[26] the State has the duty as well as the duty of insuring that the trial is consistent with due process.[27] Morever, for the reasons earlier expressed, society has a particular interest in bringing swift prosecutions, and society's representatives are the ones who should protect that interest."

One of the reasons for repudiation of the demand-waiver rule given in Barker v. Wingo was that it placed defense counsl in an awkward position for

> "If counsel is willing to tolerate some delay because he finds it reasonable and helpful in preparing his own case, he may be unable to obtain a speedy trial for his client at the end of that time." (407 U.S. at p. 527).

Barker repudiated the demand-waiver rule in its totality. This court held that a reasonable request by counsel for time to prepare for trial cannot be interpreted as a wilful delay of the trial or be used by the state courts to circumvent Davis' constitutional right to a speedy trial. The 252 days should not have been excluded by the state courts.

---

[26] Mr. Chief Justice Burger wrote for the court in Dickey v. Florida:

"Although a great many accused persons seek to put off confrontation as long as possible, the right to a prompt inquiry into criminal charges is fundamental and the duty of charging authority is to provide a prompt trial." 398 U.S. 30-37-38, 26 L. Ed 2d 26, 31, 32, 90 S. Ct. 1564 (1970) footnote omitted.

[27] As a circuit Judge, Mr. Justice Blackmun wrote:

"The government, and for that matter the trial court are not without responsibility for the expeditious trial of criminal cases. The burden for trial promptness is not solely upon the defense. The right to a 'speedy . . .trial' is constitutionally guaranteed and, as such, is not to be honored only for the vigilant and the knowledgeable. Hodges v. United States, 408 F. 2d 543, 551 (CA 8 1969)."

Standardizing the American Bar Association standards Relating to Speedy Trial (approved draft 1968, pp. 11-13) recommends vesting control over the criminal calendar in the trial court and assigning the prosecutor the responsibility of periodically filing reports with the court setting forth the reasons for delay as to each case for which he has not requested trial within a prescribed time following charging. Standards 3.8 relating to the function of the trial judge (approved draft 1972, pp. 48-50) and Standard 5.1 pertaining the function of the prosecutor (approved draft 1971, pp. 112-113) made similar recommendations.

Davis does not fall into that catagory of defendants who consciously seek to delay the trial on the merits. While the legal principles in Barker v. Wingo are controlling in Davis' case, the fact situation in Barker are sharply distinguished. Barker admitted he did not wish to be tried. In a concurring opinion Mr. Justice White stated:

> "[i]t is apparent that had Barker not so clearly acquiesced in the major delays involved in this case the results would have been otherwise. . ." (407 U.S. at p. 537)

The state courts were of the opinion that the 252 days of delay between arrest and arraignment did not

> "[i]nfringe on Davis' constitutional right to a speedy trial" (A 4a) because
>
> "[t]he court below has two terms of criminal court each year, the March and November term. . .10/

10/ Effective April 15, 1981, the Legislature again amended MCA §9-7-41 to read:

"Pearl River County: On the second Monday of March and on the first Monday of November, eighteen (18) days each, for both civil and criminal business; and on the third Monday of June and on the third Monday of September, twelve (12) days, for civil business exclusively, when no grand jury shall be drawn or impanelled unless ordered by the court; and on the first Monday of April, twenty-four (24) days, for both civil and criminal business, when no grand jury shall be drawn or impaneled unless ordered by the court.

> The State requested and was granted the continuance from the November 1979 term to the March 1980 term, . . .however, the continuance in our opinion, was not unreasonable because the trial court found the District Attorney was required to be before the grand jury the entirety of that term and there was no assistant district attorney to try the case at this term. . . ." 11/

The delays in bringing Davis to trial, despite the opinion of the Mississippi Supreme Court, were not sufficient under Amendment VI, to justify the denial of a speedy trial, and the indictment should have been dismissed and the accused discharged. What is a valid delay is explained by Mr. Justice White in the concurring opinion to Barker:

> "[O]nly special circumstances presenting a more pressing public need with respect to the case itself should suffice to justify delay. Only if special considerations are in the case and if they outweigh the inevitable personal prejudice resulting from delay would it be necessary to consider whether there has been or would be prejudice to the defendse at trial. '[T]he major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense.' United States v. Marion [(1971) 409 U.S. 307, 92 S. Ct 455, 30 L. Ed 2d 468] supra, at 320, 30 L. Ed 2d 478." (Emphasis supplied)

In the concurring opinion of Mr. Justice Brennan in Dickey v. Florida (1970) 398 U.S. 30, 52, referred to

---

11/ The Mississippi Supreme Court ignored Davis' argument that an assistant district attorney could have been supplied by judicial fiat or an executive order of the governor under MCA §25-31-21 (1972) [Court to appoint an attorney to act for the state in the absence of the district attorney.] MCA §7-5-53 (1972) (Attorney General was directed by the governor to designate an assistant to aid the district attorney.] MCA §25-31-21 (1972) is reproduced as Appendix I. MCA §7-5-53 (1972) is reproduced as Appendix J. L. Jack Stewart was the duly elected and functioning as the county attorney of Pearl River County during the period January 1, 1976 - December 31, 1980. (Official and Statistical Register 1979 - 1980 Mississippi p. 227).

an excusable delay as one of intrinsic importance to the case. Because "[t]he District Attorney was required to be before the grand jury the entirety of that term and there were no assistant district attorneys to try the case. . ." is not intrinsic to Davis' case. As pointed out hereinbefore assistant district attorney could have been provided by judicial fiat or executive order of the governor. Thus the fact that prosecutorial manpower was perceived not to be available for Davis' trial "[m]ust rest with the government rather than the defendant." (407 U.S. at p. 531)

The Mississippi Supreme Court said concerning the delay because "[t]he District Attorney was required to be before the grand jury. . ." was "[n]ot unreasonable." (A 4a) Mr. Justice Brennan in Dickey v. Florida (398 U.S. at pp. 51, 52) asked and answered the issue of the reasonabliness of governmental delay in the following words:

> "[W]hen is governmental delay reasonable? Clearly a deliberate attempt by the government to use delay to harm the accused, or governmental delay that is 'purposeful or oppressive' is unjustifiable. Pollard v. United States (352 U.S.) supra at 361, 1 L. Ed 2d at 399. See also United States v. Provoo [17 FRD 183 (DC Md), aff'd per opinion 350 U.S. 857, 100 L. Ed 761, 76 S. Ct 101 (1955)] supra. The same may be true of any governmental delay that is unnecessary, whether intentional or negligent in origin.[17] A negligent failure by government to insure speedy trial is virtually as damaging to the interests protected by the right as an intentional failure."

---

[17] It has been held that negligent delay violates the Speedy Trial Clause, Hanrahan v. United States, 121 U.S. App DC 134, 139, 348 F. 2d 363, 368 (1965); United States v. Reed, 285 F. Supp 738, 741 (DC DC 1968). Cf Fed. Rule Crim. Proc. 48(b) which gives the federal courts discretion to dismiss an indictment if there has been unnecessary delay in prosecution.

Mr. Justice Powell, in Barker said:

> "[T]he approach we accept is a balancing test. . .
>
> "[W]e identify four such factors: Length of delay, the reason for delay, the defendant's assertion of his right, and prejudice to the defendant." (407 U.S. at pp. 530, 531)

The delay of 13 months (399 days) is so excessive that it leads prima facie to the inquiry of whether there was a denial to Davis of a speedy trial. The delay is explainable because of the negligence of the state to have available in a timely manner prosecutorial manpower. Davis asserted his right on November 15, 1979, when he was arraigned.

The delay attributed by the state courts to Davis was not a delay. The March 1979 term had ended when the order was entered. All of the suggested Barker factors are present in Davis' case. After the November 1979 delay, seven of the 13 witnesses for which subpoenaes were requested by the appellant for the November 1979 term were unavailable to testify for the April 10, 1980 trial. However, no burden is placed on Davis to show he was prejudiced. Dickey v. Florida, cited supra, 398 U.S. at pp. 52, 53.

> "[O]ne court has stated 'we think that a showing of prejudice is not required when a criminal defendant is asserting a constitutional right under the Sixth Amendment.' United States v. Lustman, 258 F. 2d 475, 477-478 (CA2 Cir 1958), some have held that prejudice may be assumed after lengthy delays, e.g. Hedgepeth v. United States, 124 U.S. App. DC 291, 294 and N. 3, 364 F. 2d 684, 687, and N. 3 (1966). . .
>
> "[i]t seems that inherent in prosecutorial delay is 'potential substantial prejudice.' United States v. Wade, 388 U.S. 218, 227. . . (1967), to the interests protected by the Speedy Trial Clause. . . 'prejudice may fairly be presumed simply because everyone knows that memories fade, evidence is lost, and the burden of anxiety upon any criminal defendant increases with the passing months and years.'

United States v. Mann, 291 F. Supp 268, 271 (1968)." (Emphasis supplied)

While the speedy trial provisions of Amendment VI is a constitutional protection offered to an accused, the far more important constitutional purpose is the protection of the interests of society. Hadley v. State (Wis 1975) 225 NW 2d 461, 78 ALR 3d 273, 284. Klopper, supra, discusses the reasons for including the right of a speedy trial in the Bill of Rights. The failure to grant a speedy trial is a blot on the system of justice. From the earliest recordation of English constitutional history, it has been recognized as an obligation of the government to see that speedy trials were offered to advance the interests of justice and of society. 386 U.S. 213. In Barker, Mr. Justice Powell, for the court stated:

> "[t]here is a societal interest in providing a speedy trial which exists separate from, and at time in opposition to, the interests of the accused. The inability of the courts to provide a prompt trial was contributed to a large back log of cases in urban courts. . ." (407 U.S. at pp. 519-521)

In Strunk v. United States (1973) 412 U.S. 434, Mr. Chief Justice Burger wrote for a unanimous court that although Barker recognized the severe remedy that was occasioned when the denial of rights to a speedy trial was found:

> "[S]uch severe remedies are not unique in the application of constitutional standards in light of the policies which underlie the right to speedy trial, dismissal must remain, as Barker noted, 'the only possible remedy.'" (412 U.S. at pp. 339-340)

In United States v. West, 504 F. 2d 253, (DC Cir 1974) a unanimous court found a 13-month delay between the arrest and trial of a defendant violated the Sixth Amendment right to a speedy trial. The court per District Judge Soloman said:

> "[A]lthough West was not prejudiced at his trial by the pretrial delay, he was in jail for thirteen months between his arrest and trial.[12/] Extended pretrial detention oppresses the accused and distroys the presumption of innocence. See J. Skelly Wright, J., concurring in part and dissenting in part in Smith v. United States, 135 U.S. App. D.C. 284, 418 F. 2d 1120, 1123, 1124 (1960); Barker v. Wingo, supra 407 U.S. at 532, 533. . ."

The West court recognized that even though the reason for the 13 months delay was calender conjestion and lack of judicial manpower, such institutional delays must still be charged to the government. (504 F. 2d at p. 256, 407 U.S. at 531.) "The public interest in speedy trials can only be protected by imposing sanctions on the government when the criminal justice system is responsible for unjustifiable pretrial delays" (504 F. 2d at p. 256).

The state purposefully and negligently failed to try Davis at the March 1979 term; refused to avail itself of the Mississippi statutes (MCA §§25-31-21 and 7-5-53 (1972) to secure additional assistant district attorneys; failed to utilize the services of the county attorney; and delayed the preset November 1979 trial because of the unavailability of prosecutorial manpower. These were actions for which the state is solely responsible, thus denying the appellant a speedy trial which requires under the governing federal constitutional provision and judicial decisions that the judgment of conviction and sentence be vacated, and the cause remanded to the Mississippi Supreme Court with instructions to dismiss the indictment and discharge Malcolm Joe Davis.

[12/] Davis was also in jail for 13 months between his arrest and trial.

II.

The Mississippi Supreme Court Declined To Follow the Precedents Established By This Court And Thus Deprived Davis Of His Rights Under Amendments V and XIV; Misapplied "Miranda" and "Edwards" In Upholding the Admission Into Evidence of Two Involuntary "Confessions."

The precedents established by this court do not support the decision of the Supreme Court of Mississippi, but require the reversal of Davis v. State. (App. A).

Due process of law under Amendments V and XIV is violated if the state puts into evidence inadmissible confessions. The facts pertaining to the obtaining of the two confessions hereinbefore have been set forth in the "Statement Of The Case" (p. 4), "Pretrial Proceedings" (pp. 4-6) and the admission thereof in "Proceedings During The Trial" (pp. 7, 8, 12-13), and a recitation of those facts will not be repeated in this portion of the "Jurisdictional Statement." Although the Mississippi Supreme Court said "[t]he circumstances of this case parallel rather closely the facts of Edwards. . ." it ruled that Davis' assignment of error on this issue was not meritorious (A. 6a).

The question whether there has been a violation of the due process clause by the introduction of the two inadmissible confessions in Davis' case is one on which this court has traditionally made its own independent determination on the facts. The Supreme Court of the United States is not bound by the factual determination made by the jury; the rulings of the trial court; nor the decision of the Mississippi Supreme Court. Malinski v. New York (1945) 324 U.S. 401, 404. This court said:

> "[B]ut the question whether there has been a violation of the due process clause of the Fourteenth Amendment by introduction of an involuntary confession is one on which we must make an independent determination on the undisputed facts. Chambers v. Florida,

309 U.S. 227, 84 L. Ed 716, 60 S Ct 472, Lisenba v. California, 314 U.S. 219, 86 L. Ed 166, 62 S Ct 280; Ascraft v. Tennessee, 322 U.S. 143, 88 L. Ed 1192, 64 S Ct 921." (Emphasis supplied)

Under "due process" the accepted test is the voluntariness of two of the three confessions.[13/] The test of admissibility "[i]s that the confession is made freely, voluntarily, and without compulsion or inducement of any sort. Wilson v. United States (1896) 162 U.S. 626. There is the element of inducement in Davis' confession for he was promised that "if he would talk it would be easier for him and the law enforcement officers would do what they could for him." The uncontroverted testimony of Dr. Cox demonstrates "compulsion." Davis' will was overbourne at the time he signed the confessions and cannot be deemed the product of a rational intellect and a free will, Reck v. Pate (1961) 367 U.S. 433. Involuntary confessions are inadmissible because societal respect for the dignity and integrity of the human being does not permit officers of the state to overcome the individual will by coercion. This court has noted "[t]he strongly felt attitude of our society that important human values are sacrificed when an agency of the government, in the course of securing a conviction, wrings a confession out of the accused against his will." Blackburn v. Alabama, (1960) 361 U.S. 199.

The American judicial system is "accusatorial" as opposed to "inquisitorial." Society carries the burden

---

13/ The Davis case has many similarities to Chambers v. Florida, 309 U.S. 227. Davis' first confession given near midnight on March 9, 1979, was rejected by the Sheriff. In Chambers this court said: "[T]he rejection of the first 'confession,' given in the early hours of Sunday morning, because it was found wanting 'demonstrates the relentless tenacity which 'broke' petitioners' will and rendered them helpless to resist their accusers further." (309 U.S. at p. 240).

of proving its charge against Malcolm Joe Davis, not out of his mouth, but by evidence independently secured through skillful investigation or other legitimate means, Watts v. Indiana (1949) 338 U.S. 49, 54. The circumstances of Malcolm Davis being physically detained and incarcerated; the details of the persistent interrogation of the defendant after he told law enforcement officers he did not know anything about the rape, and did not want to talk about the matter; the recounting of the signing of the two confessions betwen 11:00 p.m. and 2:00 a.m. all have been heretofore set forth. The evidence of the personal characteristics of Davis has been expertly examined and evaluated, all of which conclusively established the involuntary signing of the two incriminating statements because of his susceptibility to the inducements used, and the coercive pressures of the stressful situation created by the law enforcement officers in procuring the "confessions." The totality of the facts and circumstances surrounding the confessions overwhelmingly establish that the incriminating statements were involuntary because the will of Malcolm Davis was overbourne. The rulings of the trial court and the use of the confessions in evidence resulted in the conviction of the defendant and deprived him of his constitutional rights guaranteed to him by Amendments V, VI and XIV.

In a series of decisions beginning in 1936, with Brown v. Mississippi, 297 U.S. 278, this court radically changed the law relative to confessions. Limitations on the admissibility of confessions were imposed. The circumstances by which a confession is obtained is a part of the process by which the state procures a conviction, and therefore subject to the requirements of the due process clause of Amendment XIV.

The trial court in the defendant's case improperly admitted the two confessions despite the conclusive evidence

that Davis made the incriminating statements under duress, fear, compulsion, and the promised reward of an easier situation. Davis' constitutional rights were violated because his conviction was based, in part if not wholly, on the two involuntary confessions. The improper admission of the confessions requires the reversal of the conviction, even if it could be said that there is ample other evidence to support the conviction. Rogers v. Richmond, (1961) 365 U.S. 534.

The early cases dealt with physical violence. Virtually all courts now recognize that psychological pressures can produce involuntary confessions. Child, 10 Akron L Rev. 261, 262; Lederer, The Law of Congession - The Voluntariness Doctrine, 74 Mil L Rev. 67, 80-82 (1976). In Blackburn v. Alabama, (1960) 361 U.S. 199, the Supreme Court has said that "the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated codes of persuasion." The uncontroverted testimony of Dr. Cox clearly established that Davis was "the proper subject," in this case. In recognition of this, all courts have come to accept that the coercion prohibited by the Constitution may include any kind of duress or inducement, physical or mental, that deprives a person, such as Davis, of his powers to make a voluntary rational free will judgment to confess. Since Brown v. Mississippi, cited supra, the cases have gradually come to stress psychological inducement in considering the issue of involuntariness. Blackburn v. Alabama, cited supra; Ferguson v. Boyd, (CA 4 1977) 566 F. 2d 873; People v. Troaut, (1960) 54 Cal 2d 576, 80 ALR 2d 1418.

It was thought by many that Miranda v. Arizona, (1966)384 U.S. 436, which required the giving of a specified warning to an accused prior to custodial interrogation would down grade the importance of the voluntary confession. It

is now clear that such has not been the case. Child, 10 Akron L. Rev. 261, 277; Dix, Mistake, Ignorance, Expectation of Benefit, and Modern Law of Confession, 1975 Washington U L Q 275, 296-97; Lederer, 74 Mil L. Rev. 67, 76.

Thus, even in a case where the Miranda warnings were properly given and a waiver properly taken, the ultimate test of admissibility of a confession still remains whether it was voluntarily made, and a confession that was physically or psychologicall coerced is still inadmissible, regardless of compliance with Miranda. Coyote v. United States, (CA 10 1967) 380 F. 2d 305, cert. den. 19 L. Ed 2d 484; State v. Watson (NM) 485 P. 2d 197; State v. Pruitt, (NC) 212 SE 2d 92; Child, 10 Akron L Rev. 261, 277. In the case of Malcolm Davis, the confession was in violation of Miranda and it was also involuntary.

Under the "totality of circumstances" test used in determining whether a confession was voluntarily made, Mississippi courts were required by the decisional law of this court to take into consideration the personal characteristics, attributes and background of Malcolm Davis. Jones, 29 Baylor L Rev. 1, 4; Lederer; 74 Mil L Rev. 67, 85; Steele 1 Nat J Crim Defense 111, 117-18; State v. Wallace (WIS) 207 NW 2d 885. The law required the Mississippi courts to carefully balance Malcolm Davis' personal characteristics with the pressures to which he was subjected when the incriminating statements were secured. The state courts in this case wholly ignored and disregarded the uncontradicted evidence of Davis' capacity to resist the overtures and pressures on March 9 and 10, 1979. Steele 1 Nat J Crim Defense at p. 130; 29 Am Jur 2d Evidence §550.

The burden of proof was on the state to establish beyond a reasonable doubt that the two confessions were voluntary. Lego v. Twomey (1972) 404 U.S. 477; Jones, 29

Baylor L Rev. 1, 3; Lederer 74 Mil L Rev. 67, 89.

In Miranda v. Arizona (1966) 384 U.S. 436, 444, this court spelled out with some specificity the rules to be followed pertaining to the admissiblity of statements obtained from any individual who is subjected to custodial police interrogation in order to assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself. The Mississippi court totally disregarded the rights of Davis under Amendment V, compelled him to incriminate himself in two confessions, and admitted the statements into evidence with the result he was convicted of the crime of rape and sentenced to prison for 30 years. In Miranda this court said:

> "[P]rior to any questioning the person must be warned that he has a right to remain silent, that any statement he does make may be used against him, that he has the right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided, the waiver is made voluntarily, knowingly and intelligently. If however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned. . ." (384 U.S. at pp. 444, 445)
>
> [A]gain we stress that the modern practice of in-custody interrogation is psychological rather than physically oriented. As we have stated before, since Chambers v. Florida, 309 U.S. 227. . .this court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark

> of an unconstitutional inquisition. Blackburn v. Alabama, 361 U.S. 199 . . ." (384 U.S. at p. 448) (Emphasis supplied)

The law enforcement officers violated Davis' Amendment V rights by continuing to question him without his attorney being present.

On May 18, 1981, this court rendered its decision in Edwards v. Arizona, _____ U.S. _____, 68 L. Ed 2d 378, 101 S. Ct 1880. The Mississippi Supreme Court said "[T]he circumstances in this case parallel rather closely the facts of Edwards. . ." (A. 6a).

Edwards, as was Davis, was arrested on a state criminal charge. He was informed of his rights as required by Miranda v. Arizona, 384 U.S. 436, as was Davis. Edwards was questioned by the police on January 19, 1976, until he said he wanted an attorney. Davis was questioned at 1:55 p.m. on March 9, 1979, and also said he wanted a lawyer. In Edwards the questioning ceased. In Davis, it did not cease. The law enforcement officers continued to question Davis and promised that if he would talk to them it would be easier. In Edwards the officer came to the jail, stated they wanted to talk to him, again informed Edwards of his Miranda rights, and obtained his confession "when he said he was willing to talk." In Davis, the sheriff and an auxillary deputy came to the jail at 11:00 p.m., had the appellant brought out of his cell, again informed Davis of his Miranda rights, obtained three confessions, two of which he signed implicating himself in the crime. Davis never expressed his willingness to talk. In Edwards, the trial court ultimately denied petitioner's motion to suppress his confession finding the confession to be voluntary, and he was thereafter convicted. In Davis, the trial court denied two motions to suppress, and he was also thereafter convicted. In Edwards the Arizona Supreme Court held that during the January 20 meeting he waived his right to

remain silent and his right to counsel when he voluntarily gave his statement after again being informed of his rights. In Davis the Mississippi Supreme Court said "[D]avis made an express waiver of his rights while Edwards evidenced opposition to the interrogation." (A. 6a)

This court said in Edwards that the use of his confession against him at his trial violated his right under the Fifth and Fourteenth Amendments to have counsel present during custodial interrogation as declared in Miranda, supra. Having exercised his right on January 19, 1976, to have counsel present during interrogation, Edwards did not validly waive that right on the 20th.

The Mississippi Supreme Court said in Davis: "[W]e conclude that after Davis' counsel failed to appear in the afternoon, he willingly waived the presence of counsel and willingly answered questions of the Sheriff (A. 6a) (Emphasis supplied.)

Miranda and Edwards both require that Davis have counsel present during custodial interrogation. At no time during the interrogation was Davis' counsel present. The failure of the Mississippi courts to hold that the admission of the two confessions was improper violated Davis' rights under Amendments V and XIV of the Constitution of the United States.

After Davis invoked his right to remain silent and to have the assistance of counsel at 1:55 p.m. on March 9, 1979, the state illegally continued to interrogate him in the absence of counsel; and the state did not meet its heavy burden of establishing that the appellant intentionally waived his constitutional rights in signing the two confessions which were introduced into evidence. Further, Davis' confessions could not be said to be voluntary because a law

enforcement officer told the appellant that if he would talk to the law enforcement officers, it would make it lighter on the accused.

Davis did not validly waive the right to have counsel present during the three hours of interrogation which begun at 11:00 p.m. on March 9, 1979.

In Edwards this court said the petitioner did not waive his right to have counsel present because

> "[t]he Arizona Supreme Court applied an erroneous standard for determining waiver where the accused has specifically invoked his right to counsel. It is reasonably clear under our cases that waivers of counsel must not only be voluntary, but constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case 'upon the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused.'" Johnson v. Zerbst, 304 U.S. 458, 464, 82 L. Ed 1461, 58 S Ct 1019, 146 ALR 357 (1938). See Faretta v. California, 422 U.S. 806, 835, 45 L. Ed 2d 562, 95 S Ct 2525 (1975); North Carolina v. Butler, 441 U.S. 369, 374-375, 60 L. Ed 2d 286, 99 S Ct 1755 (1979); Brewer v. Williams, 430 U.S. 387, 404 51 L. Ed 2d 424, 97 S Ct 1232 (1977); Fare v. Michael C., 442 U.S. 707, 724-725, 61 L. Ed 2d 197, 99 S Ct 2560 (1979).

A "conclusion" of the Mississippi Supreme Court that Davis waived his rights because counsel did not appear "in the afternoon" is also "[a]n erroneous standard for determining waiver. . ." The state courts never separately focused on whether Davis had knowingly and intelligently relinquished his right to counsel, as required by Edwards, (68 L. Ed 2d at p. 385

> "[T]he waiver of constitutional guarantee is a matter of federal constitutional law. The Supreme Court announced in Johnson v. Zerbst, 304 U.S. 458. . .(1938), a standard that has been repeated and affirmed; the burden is upon the state to demonstrate 'an intentional relinquishment or abandonment of a known right or privilege.' Id. at 464. . .The Supreme Court has consistently required adherence to a 'totality of circumstances' test in assessing

> the effect of constitutional waivers. See North Carolina v. Butler, 441 U.S. 369. . .(1979); Boulden v. Holman, 384 U.S. 478. . .(1969).
>
> "[A]s we recently noted '[i]n considering the voluntariness of a confession this court must take into account a defendant's mental limitations, to determine whether through susceptibility to surrounding pressures or inability to comprehend the circumstances, the confession was not a product of his own free will.' Janek v. Estelle, 623 F. 2d 629, 937 (5th Cir. 1980. . .) A fundamental concern is a mentally deficient accused's vulnerability to suggestion. See Sims v. Georgia, 389 U.S. 404. . .(1967); Calombe v. Connecticut, 367 U.S. 568 . . .(1961)54/ (footnote omitted.) (Henry v. Dees, No. 79-2585 decided Oct. 8, 1981, slip opinion pp. 12046-12052.

III.

The Majority Of The Mississippi Supreme Court Also Refused To Follow The Precedents Of This Court Relative To The Comments Of The Assistant District Attorney and The Interpretative Explanation Of The Trial Judge To The Jury On Appellant's Failure To Testify And Violated His Rights Under Amendment V.

Again the precedents established by this court do not support the decision of the majority of the Mississippi Supreme Court but require the reversal of Davis v. State.

The self-incrimination guaranty of the Fifth Amendment, in its bearing on Mississippi and the other states by reason of the Fourteenth Amendment, forbids either comment by the prosecution on accused's silence and the explanation of the trial judge in the presence of the jury. Griffin v. California (1965) 380 U.S. 609, reh den 381 U.S. 957.

The facts pertaining to the comment, explanation and ruling of the trial court and the decision of the Mississippi Supreme Court have been set forth hereinbefore at pages 15-20 in the subsection "Comments by Prosecutor.

and Court on Appellant's Failure To Testify Violated His Amendment V Rights." The dissenting opinion in this case correctly states the law as it has existed in Mississippi since 1895. The facts and statements set forth hereinbefore will not be repeated.

The statements were comments on the appellant's failure to testify in his own behalf, and necessarily directed the attention of the jury to the fact that Davis had not testified. Smith v. State, 87 Miss 617, 40 So. 230. MCA §13-1-9 (1972) as well as Amendment V forbids comment upon the failure of an accused to testify without regard to the character of the comment.

In Griffin v. California, supra, this court said;

> "[T]he Fifth Amendment, in its direct application to the federal government and its bearing on the states by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt; hence, a state may not validly apply to a state criminal prosecution a state constitutional provision that in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury."

Davis' liberty should not depend on the struggle of the Mississippi Supreme Court to determine whether or not the prosecutor's remarks were "evoked" or prompted by anything. The questions to consider "[i]s what the jury probably through. United States v. Hardman, 447 F. 2d 853, 855. The dissenting Mississippi Supreme Court judge thought that:

> "For twelve jurors under those circumstances to restrict their thoughts solely to the defendant's statements to the law officials, and not also instantly be alerted by this comment tho defendant could have denied his guilt as a witness from the witness chair, each would first require a lobotomy...."

CONCLUSION

For the foregoing reasons, probable jurisdiction of this appeal should be noted.

Respectfully Submitted,

F. KENT STRIBLING

DIXON L. PYLES
(Counsel of Record)

Dated: March 13, 1982

F. KENT STRIBLING
309 Barnett Building
200 South President Street
Jackson, Mississippi 39201
(601) 948-5105

PYLES & TUCKER
507 East Pearl Street
Jackson, Mississippi 39201
(601) 354-5668

COUNSEL FOR APPELLANT

NO.

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MALCOLM JOE DAVIS

Appellant

V

STATE OF MISSISSIPPI
Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of March, 1982, I caused to be delivered personally the original and two copies of the Notice of Appeal To The Supreme Court of the United States; three copies of the Motion for Leave to Proceed In Forma Pauperis; three copies of the Affidavit In Support of Motion For Leave to Proceed on Appeal in Forma Pauperis; three copies of the Jurisdictional Statement in the above entitled case to counsel of record for the Appellee, at the address listed below:

Honorable Bill Allain
Attorney General of Mississippi
Carol Gartin Building
Jackson, Mississippi

Mr. Robert Womack, Clerk
Mississippi Supreme Court
Carol Gartin Building
Jackson, Mississippi

I further certify that all parties required to be served have been served.

F. KENT STRIBLING
309 Barnett Building
200 South President
Jackson, Mississippi 39201
Of Counsel for Appellant

Malcolm Joe DAVIS

v.

STATE of Mississippi.

No. 52659.

Supreme Court of Mississippi.

Sept. 9, 1981.

Opinion Modified On Denial of Rehearing Dec. 16, 1981.

Defendant was convicted before the Circuit Court, Pearl River County, R. I. Prichard, III, J., of rape, and he appealed. The Supreme Court, Patterson, C. J., held that: (1) delay of 150 days between arraignment and trial was not unreasonable; (2) two continuances were necessary and reasonable, and granting of such continuances was not violative of speedy trial statute; (3) eight-month delay from indictment to arraignment was not shown to have infringed on defendant's constitutional right to speedy trial; (4) defendant's constitutional right to counsel had been sufficiently protected in such case in which interrogation had ceased after deputies had immediately complied with defendant's request for counsel and in which defendant was subsequently advised of his rights and then waived them; (5) evidence was sufficient to establish corpus delicti of the crime of rape; and (6) permitting sheriff, who testified and who assertedly was the only law enforcement official available in the courtroom, to serve as a bailiff and remain in courtroom after witnesses had been placed "under the rule" was not abuse of discretion.

Affirmed.

Hawkins, J., dissented and filed opinion.

1. Criminal Law ⇐577.15(4)

Statutory 270-day time limitation was met in case in which defendant was indicted in March 1979, was arraigned in November 1979 and was brought to trial in April 1980, in light of the fact that the time prior to arraignment was not to be considered in determining whether there had been compliance with statute. Code 1972, § 99–17–1.

2. Criminal Law ⇐577.15(4)

Delay of 150 days between defendant's November 1979 arraignment and April 1980 trial at which he was convicted of rape was not unreasonable, in view of fact that trial court had two terms of criminal court each year, consisting of the March and November terms.

3. Criminal Law ⇐577.10(7, 8)

Eight-month continuance, which was granted on defendant's request in rape case so as to permit completion of psychological tests on him, and four-month continuance, which was granted because district attorney was required to be before grand jury for entire term of court and there were no assistant district attorneys to try the case at that time, were necessary and reasonable, and granting such continuances was not violative of speedy trial statute. Code 1972, § 99–17–1.

4. Criminal Law ⇐577.15(4)

Eight-month delay from rape indictment to arraignment was not shown to have infringed on defendant's constitutional right to speedy trial, absent any evidence in support of argument that it had been the custom of trial judge not to arraign criminal defendants until they were to be tried at the term. U.S.C.A.Const. Amend. 6.

5. Criminal Law ⇐577.10(1)

Procedure of arraigning criminal defendants at the term set for trial has the potential to violate defendants' constitutional right to speedy trial. U.S.C.A.Const. Amend. 6.

6. Criminal Law ⇐577.15(4)

Delay from time of March 1979 rape indictment, to November 1979 arraignment, to April 1980 trial was not shown to have violated defendant's right to speedy trial, though it was asserted that defendant's incarceration contributed to mental and physical deterioration. U.S.C.A.Const. Amend. 6.

7. Criminal Law ⇐698(1)

Absent contemporaneous motion to exclude during trial, objection to admission of confession was waived.

8. Criminal Law ⇐412.2(5)

Defendant's constitutional right to counsel had been sufficiently protected in case in which interrogation had ceased after deputies had immediately complied with defendant's request for counsel by permitting defendant to talk with an attorney and in which, in an interrogation initiated by the sheriff nine hours later, defendant was advised of his rights and waived them. U.S.C. A.Const. Amend. 6.

9. Rape ⇐7

All that is necessary for the crime of rape is that there be some penetration of female's private parts by sexual organ of the assailant. Code 1972, § 97–3–65.

10. Rape ⇐51(2)

Evidence, including prosecutrix' testimony that defendant "turned me over and forced me to have sexual intercourse, what I mean by sexual intercourse is he forced his penis into my vagina," circumstances corroborating prosecutrix' testimony and other evidence, was sufficient to establish corpus delicti of crime of rape. Code 1972, § 97–3–65.

11. Criminal Law ⇐721(3)

If a prosecutor's statement can reasonably be construed by jury as a comment on accused's failure to testify, it would be immaterial that the prosecutor has intended to refer to a situation other than the trial-in-chief.

12. Criminal Law ⇐1144.10

Trial court would be assumed to have ruled correctly in refusing to grant mistrial in criminal proceeding on basis of contention that remark made by assistant prosecutor in closing argument was a comment on defendant's failure to testify where defense counsel did not preserve the closing argument for the record by bill of exceptions or otherwise.

13. Criminal Law ⇐665(7)

Permitting sheriff, who testified in criminal proceeding and who assertedly was the only law enforcement official available in the courtroom, to serve as a bailiff and remain in courtroom after witnesses had been placed "under the rule" was not abuse of discretion.

F. Kent Stribling, Dixon L. Pyles, Pyles & Tucker, Jackson, David R. Smith, Smith, Smith, Tate & Stuart, Poplarville, for appellant.

Bill Allain, Atty. Gen. by Mark A. Chinn, Sp. Asst. Atty. Gen., Jackson, for appellee.

En Banc.

PATTERSON, Chief Justice, for the Court:

In the Circuit Court of Pearl River County, Malcolm Joe Davis was tried and convicted of rape and sentenced to thirty years in the Mississippi Department of Corrections. Davis appeals, assigning several errors.

1. The failure of the court to grant the defendant a speedy trial violated his constitutional rights under Amendment VI of the United States Constitution, aggravated his mental condition because the prolonged incarceration prior to his trial was unduly oppressive, maximized his anxiety and concern which accompanied the public accusation of the appellant, and greatly impaired his ability to defend himself.

2. The conduct of the trial judge amounted to an intrusion into the jury's fact finding role because it structured the verdict of guilty; it relieved the state of establishing "beyond a reasonable doubt" the charge against the defendant in the indictment; and it shifted to the defendant the burden of persuasion of his innocence.

3. The defendant's rights under Amendments VI and XIV of the Constitution of the United States and under MCA § 13–5–2 (1975) were violated by the failure of the state to select the special venire from a fair cross section of the population of Pearl River County.

4. The procurement, use and admission into evidence of the several involuntary confessions deprived the defendant of the essential elements of due process guaranteed by Amendment V of the United States Constitution, of the right to the effective assistance of counsel in violation of Amendment VI of the United States Constitution, and of the protection afforded by the "Mississippi Criminal Rules of Circuit Court Practice."

5. Davis' right to a fair trial under Amendments V, VI, and XIV of the United States Constitution were abrogated by the trial court's actions:

(a) in refusing to grant a mistrial on the motion of the defendant when Mason Sistrunk, a witness for the state, purposely exhibited, displayed and exposed certain prejudicial objects to the jury before the objects were admitted into evidence; and, thereafter, when the state failed to offer the prejudicial objects into evidence, denying the defendant the right to cross-examine the witness and procure testimony favorable to the accused;

(b) in refusing to grant a mistrial when the assistant prosecutor was allowed over objection to argue and comment on the failure of the defendant to testify in his own behalf;

(c) in refusing to grant the motion of the defendant to dismiss and discharge him at the conclusion of the state's case when the proof of the elements of the corpus delicti were wholly lacking, and again refusing at the conclusion of the trial to dismiss and discharge the defendant;

(d) in refusing to sustain the objections of the defendant to certain testimony of the state, and in sustaining the objections of the state to the evidence of the defendant.

6. The court abused its discretion in permitting Sheriff L. W. Holliday to serve as a bailiff and remain in the courtroom to hear the testimony of other witnesses and mingle with the other witnesses in the witness room, and in permitting him to testify over the objection of the defendant after all witnesses had been placed "under the rule" at the outset of the trial.

The prosecutrix, on the morning of March 9, 1979, was raped, after a struggle, in her home by a man wearing knee-high stockings over his head and hands. After the rape the man led the prosecutrix into the bathroom and made her take a douche. After he left, the prosecutrix went to her husband's office and with him to the police. She identified her assailant in court as Malcolm Davis, a man who had been to her home to repair the washing machine on a previous occasion. There were witnesses who recalled seeing, just before the time of the rape, Malcolm Davis walking near the prosecutrix' home and his truck parked in the vicinity of the home. Four knee-high stockings were found under a bridge near the prosecutrix' house. The containers were found in Davis' truck. A checkout girl in a local market recalled selling the stockings to Davis a few days before the rape.

Davis was taken into custody about 1:50 p. m. on March 9, 1979. Although Davis was advised of his *Miranda* rights, he signed a waiver of those rights and requested counsel. Deputy Sistrunk phoned Davis' attorney and Davis conferred with him over the phone. Some interrogation was continued that afternoon, but no prejudicial or incriminating statements were obtained from Davis, although Deputy Sistrunk later testified at trial that at some time in the afternoon he encouraged Davis to cooperate. Sistrunk testified:

> . . . If you will talk to us, we'll cooperate with you every way we can, and I told him, I said, "Do you want a lawyer, there's the phone. I'm not going to be hostile to you in anyway." I have a tendency to talk boisterous to people. That's my nature, and a lot of people take me wrong in doing that, but I'm known to be loud, and I was possibly was loud with him. I'm always loud.
>
> . . . .

> ... I told him it would be best. It would make it lighter on yourself. I always feel that way.

At 11:00 p. m. on the same day, Sheriff Holliday and Auxiliary Deputy McCaleb talked with Davis when he was again advised of his rights and again signed a waiver of those rights. From this questioning, the sheriff obtained two signed statements from Davis admitting the rape. Sheriff Holliday testified that Davis did not make a request to contact his attorney, explaining as follows: "Whenever I read him his rights, and he signed that waiver of rights, he told me that he had spoken to his attorney, but he was still willing to talk to me at that time." Davis was indicted for rape on March 16, 1979, and arraigned on November 15, 1979. Trial began April 10, 1980.

Although Davis assigns numerous errors in the trial court, we are of the opinion only five of these errors warrant discussion as the remaining errors are believed to be without merit.

First, Davis contends the trial court failed to grant a speedy trial, violating his sixth amendment rights. Specifically, Davis asserts undue delay from the time of indictment, March 16, 1979, to the time of arraignment, November 15, 1979, and to the time of trial, April 10, 1980.

On April 3, 1980, Davis filed a motion to dismiss the indictment based on the state's failure to bring him to trial within the 270 day time period of MCA § 99–17–1 (Supp. 1980). This motion was overruled because the delay was the result of continuances granted.

We are of the opinion there was no untimely delay between the arraignment and trial date. MCA § 99–17–1 (Supp.1980) provides that "[u]nless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned."

[1] Since the time prior to arraignment is not computed to determine compliance with this statute and less than 150 days passed between the date of arraignment and the date of trial, we conclude the State adequately met the 270 day limitation as set forth in § 99–17–1. *See Speagle v. State*, 390 So.2d 990 (Miss.1980).

[2, 3] Moreover, the delay of 150 days is not unreasonable in view of the fact that the court below has two terms of criminal court each year, the March and November terms. Defendant cannot be heard to complain about the first continuance from the March 1979 to the November 1979 term because defense requested it to complete psychological tests of defendant. The State requested and was granted the continuance from the November 1979 term to the March 1980 term, so this delay was not incurred by the defendant; however, the continuance, in our opinion, was not unreasonable because the trial court found the District Attorney was required to be before the grand jury the entirety of that term and there were no assistant district attorneys to try the case at this term. Although the appellant now contends that he objected to this continuance we are unable to find any support for it in the record. We, therefore, think both continuances were necessary and reasonable and within the sound discretion of the trial judge and surely not violative of MCA § 99–17–1 (Supp.1980), which permits continuances for good cause, as here.

[4, 5] Turning to the eight month delay from indictment to arraignment, Davis asserts it was the custom of the trial judge not to arraign criminal defendants unless they were to be tried at the term. Again there is no evidence of this in the record. We, therefore, are of the opinion the delay did not infringe on Davis' constitutional right to a speedy trial. We emphasize, however, the importance of early arraignment within a reasonable time. Although there is no evidence in the record to support the argument, the procedure of arraigning criminal defendants at the term set for trial, if true, has the potential to violate the defendant's right to a speedy trial through the four prong balancing test set forth in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 101 (1972), and adopted in

Wells v. State, 288 So.2d 860, 862 (Miss. 1974), namely: "'[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."

[6] Presently, on balance, we are unable to state there was error in not dismissing the indictment. Although there was some testimony that the appellant's incarceration contributed to both his mental and physical deterioration, it was not conclusive upon the trial judge as he had other factors to consider in conjunction with it, such as the appellant's physical appearance and demeanor, the testimony of the deputies and the sheriff as to the appellant's mental and physical condition. We, therefore, are of the opinion the appellant's right to a speedy trial was not violated.

[7] Davis also assigns as error the admission into evidence of the two signed confessions. There are two aspects of the admission of these statements which are troublesome, whether they were voluntarily given and whether there was an intelligent waiver of counsel.

The Pearl River County deputies and the sheriff testified in the suppression hearing concerning the arrest and questioning of Davis that no threats, coercion, or promise of reward was made to him. The trial judge ruled the confessions voluntary and thus admissible. After the suppression hearing and during the case-in-chief, Deputy Sistrunk stated on cross-examination by defense counsel that he had told Davis on the afternoon of March 9, 1979, that it would be best if he would cooperate, that it would be lighter for him. No objection to the introduction of the confession was made at that time based on the ground that, "it would make it lighter on yourself." The point was not raised until Davis moved for a new trial after the verdict.

In *Stubbs v. State*, 311 So.2d 339, 342 (Miss.1975), we stated "[t]he trial court correctly held after preliminary inquiry that the confession was competent evidence and in the absence of a motion to exclude during the course of the trial, the testimony of the appellant only went to the weight and credibility of the confession." In *Stubbs*, a police officer had testified at a preliminary hearing that the defendant made a voluntary confession without threat, promises, or inducement. The defendant offered no evidence to refute the voluntariness of the confession. Thus the trial court admitted the testimony concerning the statement into evidence. In the trial-in-chief the defendant testified that he had requested the presence of his attorney during the questioning in which he made the statement, and this request was denied. However, the defendant made no motion to exclude the testimony of the officer concerning the confession. This Court, finding no error in the admission of the confession at the hearing, held the defendant's testimony applicable only to the weight and credibility of the confession. Similarly, in this case, absent a contemporaneous motion to exclude during the trial, the objection to the admission of the confession was waived.

[8] Davis cites a recent U.S. Supreme Court case, *Edwards v. Arizona*, —— U.S. ——, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), as determinative of error in the admission of Davis' confessions. The *Edwards* case involved an oral confession of a man charged with murder. Edwards was arrested on January 19, 1976, and informed of his rights. After being told that another suspect had implicated him in the crime, Edwards indicated he wanted to "make a deal." After speaking briefly with the county attorney Edwards requested counsel. Questioning then ceased until the next morning when two detectives came to talk with Edwards. The jail guard informed him that the detectives wished to see him, but Edwards indicated that he did not want to talk to anyone. The guard then told Edwards that "he had" to talk with the detectives and took him to meet them. After the detectives read Edwards his rights, an oral confession was obtained from him. The U.S. Supreme Court held that Edwards had not made a valid waiver of his right to counsel, stating:

> ... and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further *police-initiated* custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication*, exchanges or conversations with the police. Id. at ——, 101 S.Ct. at 1884. (Emphasis added)

The circumstances in this case parallel rather closely the facts of *Edwards*, but with some significant differences. Both cases concern a second police-initiated interrogation, but here Davis made an express waiver of his right to remain silent while Edwards evidenced opposition to the interrogation. Moreover, in *Edwards* the second interrogation occurred before counsel had been made available to him. Yet here Davis' request for counsel was immediately complied with during the afternoon interrogation. The officer telephoned Davis' attorney and permitted him to speak with the attorney. After talking with the attorney, Davis reported to the officer that the attorney would come to the sheriff's office that afternoon and confer with him; however, the attorney did not come to the sheriff's office that afternoon and did not confer with Davis that date except in the telephone conversation. Some nine hours later the sheriff and a deputy talked with Davis and obtained his confession. Although this interrogation was initiated by the sheriff, Davis was advised of his rights and waived them. Davis told the sheriff he had spoken to his attorney, but he was still willing to talk to the sheriff at that time. We conclude that after Davis' counsel failed to appear in the afternoon, he willingly waived the presence of counsel and willingly answered questions of the sheriff. Comparison of these cases reveals both access to counsel and an express willingness to talk in this case which were not present in *Edwards*.

In *Edwards* the Court emphasized that "the voluntariness of ... an admission on the one hand, and a knowing and intelligent waiver on the other, are discreet inquiries." Id. at ——, 101 S.Ct. at 1884. The error in the *Edwards'* case, as we view it, lay in the state courts' failure to focus on whether Edwards intelligently and knowingly relinquished his right to counsel. Here the trial court in ruling on the motion to suppress made specific findings as to both voluntariness and knowing and intelligent relinquishment of rights.

The *Edwards* Court stressed throughout the opinion that the Court was not abandoning prior decisions, rather reconfirming and emphasizing the importance of the *Miranda* safeguards surrounding an accused's right to counsel. In considering the factual distinctions between these two cases it appears to us that *Edwards* is not presently controlling because the record reveals that Davis' constitutional right to counsel was meticulously protected as required by *Miranda* and *Edwards*. We, therefore, think this assignment of error is without merit.

Davis next contends he was denied a fair and impartial trial by the failure of the State to establish the corpus delicti of the crime. The crime of rape consists of a person having carnal knowledge of a woman over the age of 12, against her will. MCA § 97-3-65 (Supp.1980). Thus, it is necessary that both aspects of the act—carnal knowledge and force—be proved by the State.

The prosecutrix testified that the defendant after pulling a pillowcase over her head "turned me over and forced me to have sexual intercourse. What I mean by sexual intercourse is he forced his penis into my vagina." This Court has stated "that the testimony of the victim of a rape may be sufficient to support a guilty verdict where the victim's testimony is neither contradicted nor discredited by other evidence or by surrounding circumstances." *Dubose v.*

Mississippi, 320 So.2d 773, 774 (Miss.1975). The testimony of the prosecutrix was corroborated by witnesses who knew Davis and saw him, as well as his truck, in the vicinity of the prosecutrix' home at the time.

[9, 10] The prosecutrix also testified the sexual intercourse with Davis was against her will, stating that she struggled with him, was pushed to the floor, that she screamed, and was threatened with harm if she didn't cooperate. Although no signs of external injury or sperm were found, the presence of either is not considered absolutely determinative of rape. "The rule is that physical force on the part of the assailant, or physical resistance on the part of the victim, is not necessary if the proof shows beyond a reasonable doubt that the female surrendered because of fear arising out of a reasonable apprehension of great bodily harm." *Fields v. State*, 293 So.2d 430, 432 (Miss.1974). The testimony of the prosecutrix evidenced a reasonable apprehension of bodily harm. The examining physician testified that his examination was complicated by the douche and by menstrual bleeding. All that was necessary for the crime was "some penetration of the female's private parts by the sexual organ of the assailant." *Lang v. State*, 230 Miss. 147, 158, 87 So.2d 265, 268 (1956). The testimony of the prosecutrix, corroborated by the surrounding circumstances and other evidence, was sufficient, in our opinion, to prove the corpus delicti of the crime.

The appellant also contends there was reversible error because the trial court refused to grant a mistrial when the assistant prosecutor in the closing argument was allowed to comment on the failure of the defendant to testify in his own behalf. Since defense counsel did not preserve the closing argument for the record by a bill of exceptions or otherwise, we must assume the court's ruling in this regard correct. The trial court dictated into the record the following:

> Let the record show that the Assistant Attorney was arguing the case, and in his argument of speaking of the times that the statements were made by the defendant and in reference to those statements, he made the statement that all the defendant had to do at that time was deny that he had committed the offense. Upon him stating that, the defense attorneys have now moved the Court for a mistrial. The Court finds that the statements made by the Assistant District Attorney were made in regard to 9 March, '79, and in the early morning of 10 March, 1979, and in conjunction with the statements that were made to the Sheriff and the other witness at said time and place and were not in any manner referring to any other time, place, circumstance or situation; and for this reason, the motion be and the same is hereby overruled.

[11, 12] If the attorney's statement could reasonably be construed by the jury as a comment on Davis' failure to testify, then it would be immaterial that the attorney intended to refer to a situation other than the trial-in-chief. *Reddick v. State*, 72 Miss. 1008, 16 So. 490 (1895). Without the precise words of the argument or the context in which it was made, we have difficulty in determining a reasonable construction of the statement or in determining possible prejudicial effect on the jury's verdict. In this situation we must assume the trial court properly resolved the question as indicated by his above statements. In reaching this conclusion we note the testimony that Davis first denied his participation in the crime but later confessed, a fact which possibly evoked the comment. Nor do we have, as did the trial court, the benefit of defense counsel's argument which might have prompted the comment of the assistant district attorney in reply. In any event we have long declined to rule on matters not preserved in the record in sufficient detail for purposes of appeal. *Shelton v. Kindred*, 279 So.2d 642 (Miss.1973). Thus, we conclude this contention to be without merit.

[13] Finally the appellant contends that he was greatly prejudiced by the sheriff's presence in the courtroom after the rule had been invoked, particularly since the

sheriff was a witness in the case. While it is true that Davis objected to the sheriff's presence after the rule had been invoked, nevertheless the sheriff was exempted by the court because he was needed in the courtroom. The judge gave the following explanation:

> . . . [D]uring most of this trial, because of the other deputies being under the rule, the Sheriff has been the only law enforcement official in the Courtroom and available to the Court and has been performing his normal duties as Sheriff during the trial of this cause.

There is no suggestion by the defendant, as we view the record, that the sheriff acted with any impropriety, the only contention being that he must have heard the other witnesses testify; and therefore, we suppose, in some fashion not pointed out, either altered his testimony or by his very presence prejudiced the jury. We do not ascertain from our research of the record or from this argument that the trial judge in any way abused his discretion in permitting the sheriff to remain in the courtroom. *Fondren v. State*, 253 Miss. 241, 175 So.2d 628 (1965). The present factual situation does not rise to the proportions of those in *Dunn v. State*, 264 So.2d 823 (Miss.1972), *Perkins v. State*, 244 So.2d 414 (Miss.1971), or *Smith v. State*, 251 Miss. 241, 169 So.2d 451 (1964).

We have meticulously examined the other assignments of error and find them without merit. In sum, the record reveals sufficient credible evidence to support the jury's verdict and there being no prejudicial error in the record in our opinion, the cause is affirmed.

AFFIRMED.

SMITH, and ROBERTSON, P. JJ. and SUGG, WALKER, BROOM, LEE and BOWLING, JJ., concur.

HAWKINS, J., dissents.

HAWKINS, Justice, dissenting:

Respectfully, I must dissent.

Mississippi Code Annotated § 13-1-9 (1972) requires, and this Court has held in numerous decisions, that no comment whatsoever shall be made upon the defendant's failure to testify in a case. We have gone further and held no comment can be made which could be construed by the jury as a comment on failure by the accused to testify. *Brown v. State*, 340 So.2d 718 (Miss. 1976); *Lambert v. State*, 199 Miss. 790, 25 So.2d 477 (1946); *Reddick v. State*, 72 Miss. 1008, 16 So. 490 (1895).

As this Court stated in *Prince v. State*, 93 Miss. 263, 46 So. 537 (1908), the jury cannot avoid being keenly cognizant of the defendant's failure to testify, and the defendant being manifestly the one person most interested in the outcome of the case, the jury can only wonder why he did not testify. To make any kind of comment that can be construed as a statement to the jury as "Well, if he was not guilty, he could have denied it," can only result in serious prejudice to the defendant's statutory and Constitutional rights under the Fifth Amendment to the Constitution.

The Court stated in pertinent part:

> . . . The Assistant Attorney was arguing the case, and in his argument of speaking of the times that the statements were made by the defendant and in reference to those statements, he made the statement that all the defendant had to do at that time was deny that he had committed the offense.

For twelve jurors under those circumstances to restrict their thoughts solely to the defendant's statements to the law officials, and not also instantly be alerted by this comment the defendant could have denied his guilt as a witness from the witness chair, each would first require a lobotomy. In my view, the statement by the assistant prosecutor can only be construed as a comment on the failure of the defendant to testify.

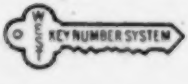
This Court has taken pains so often to warn and urge prosecuting attorneys to refrain from any comment of this nature. It is also probably true that most cases of this nature never reach this Court because the

trial judges as a rule declare a mistrial on the spot. That, at least, has been the experience of the author of this dissent, as a district attorney and an observer of criminal trials over the years. In this particular record, with the proof of the guilt of the defendant so strong, it was as strange as it was unnecessary to make the comment made by the state.

The learned trial judge in this case I am sure did everything possible to prevent the unfortunate inference being impressed upon the jurors' minds, but I think the inference inescapable and unavoidable.

I specially concur with the majority opinion relative to the confession of the defendant. Ordinarily, any statement made by a law enforcement officer to an accused, as was made in this case, that it would be better for him to cooperate and "it would be lighter for him," would taint the admission or confession and render it totally incompetent. Citation of authority is unnecessary to this well-settled proposition of law.

In this case, however, the revelation that such a promise had been made to the accused was first elicited from the officer during the trial by defense counsel on cross-examination. Yet, counsel made no objection, no motion to exclude the confession, and the first we learn of his taking umbrage from such disclosure was in the motion for a new trial. We can only assume defense counsel either approved or was unperturbed. To wait until the jury has returned a verdict of guilty before voicing any complaint was somewhat late, and the accused thereby clearly waived a definite right that he once had to object.



Jerry Curtis LEWIS

v.

Lela Earline Penton Lewis Mitchell NYBO.

No. 53030.

Supreme Court of Mississippi.

Dec. 2, 1981.

Appeal from Chancery Court, Pearl River County; Howard L. Patterson, Jr., Chancellor.

Cornelius J. Ladner, Bay St. Louis, for appellant.

Stewart, Burks & Pace, Delos H. Burks, Picayune, for appellee.

Before BROOM, LEE and HAWKINS, JJ.

AFFIRMED.

John FORYT

v.

SOUTHWEST MISSISSIPPI REGIONAL MEDICAL CENTER.

No. 52876-A.

Supreme Court of Mississippi.

Dec. 2, 1981.

Appeal from Circuit Court, Pike County; Joe N. Pigott, Judge.

T. Mack Brabham, McComb, for appellant.

Roach, McMillan, Welch & Ott, John Gordon Roach, Jr., McComb, Wise, Carter, Child & Caraway, George O. Evans and Douglas E. Levanway, Jackson, for appellee.

Before PATTERSON, C.J., and SUGG and LEE, JJ.

AFFIRMED.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 52,659

MALCOLM JOE DAVIS

v.

STATE OF MISSISSIPPI

EN BANC

PATTERSON, CHIEF JUSTICE, FOR THE COURT:

In the Circuit Court of Pearl River County, Malcolm Joe Davis was tried and convicted of rape and sentenced to thirty years in the Mississippi Department of Corrections. Davis appeals, assigning several errors.

1. The failure of the court to grant the defendant a speedy trial violated his constitutional rights under Amendment VI of the United States Constitution, aggravated his mental condition because the prolonged incarceration prior to his trial was unduly oppressive, maximized his anxiety and concern which accompanied the public accusation of the appellant, and greatly impaired his ability to defend himself.

2. The conduct of the trial judge amounted to an intrusion into the jury's fact finding role because it structured the verdict of guilty; it relieved the state of establishing "beyond a reasonable doubt" the charge against the defendant in the indictment; and it shifted to the defendant the burden of persuasion of his innocence.

3. The defendant's rights under Amendments VI and XIV of the Constitution of the United States and under MCA §15-5-2 (1975) were violated by the failure of the state to select the special venire from a fair cross section of the population of Pearl River County.

4. The procurement, use and admission into evidence of the several involuntary confessions deprived the defendant of the essential elements of due process guaranteed by Amendment V of the United States Constitution, of the right to the effective assistance of counsel in violation of Amendment VI of the United States Constitution, and of the protection afforded by the "Mississippi Criminal Rules of Circuit Court Practice."

5. Davis' right to a fair trial under Amendments V, VI, and XIV of the United States Constitution were abrogated by the trial court's actions:

(a) in refusing to grant a mistrial on the motion of the defendant when Mason Sistrunk, a witness for the state, purposely exhibited, displayed and exposed certain prejudicial objects to the jury before the objects were admitted into evidence; and, thereafter, when the state failed to offer the prejudicial objects into evidence, denying the defendant the right to cross-examine the witness and procure testimony favorable to the accused;

(b) in refusing to grant a mistrial when the assistant prosecutor was allowed over objection to argue and comment on the failure of the defendant to testify in his own behalf;

(c) in refusing to grant the motion of the defendant to dismiss and discharge him at the conclusion of the state's case when the proof of the elements of the

corpus delicti were wholly lacking, and again refusing at the conclusion of the trial to dismiss and discharge the defendant,

(d) in refusing to sustain the objections of the defendant to certain testimony of the state, and in sustaining the objections of the state to the evidence of the defendant.

6. The court abused its discretion in permitting Sheriff L. W. Holliday to serve as a bailiff and remain in the courtroom to hear the testimony of other witnesses and mingle with the other witnesses in the witness room, and in permitting him to testify over the objection of the defendant after all witnesses had been placed "under the rule" at the outset of the trial.

The prosecutrix, on the morning of March 9, 1979, was raped, after a struggle, in her home by a man wearing knee-high stockings over his head and hands. After the rape the man led the prosecutrix into the bathroom and made her take a douche. After he left, the prosecutrix went to her husband's office and with him to the police. She identified her assailant in court as Malcolm Davis, a man who had been to her home to repair the washing machine on a previous occasion. There were witnesses who recalled seeing, just before the time of the rape, Malcolm Davis walking near the prosecutrix' home and his truck parked in the vicinity of the home. Four knee-high stockings were found under a bridge near the prosecutrix' house. The containers were found in Davis' truck. A checkout girl in a local market recalled selling the stockings to Davis a few days before the rape.

Davis was taken into custody about 1:50 p.m. on March 9, 1979. Although Davis was advised of his Miranda rights, he signed a waiver of those rights and requested counsel. Deputy

Sistrunk phoned Davis' attorney and Davis conferred with him over the phone. No interrogation occurred that afternoon, although Deputy Sistrunk later testified at trial that at some time in the afternoon he encouraged Davis to cooperate. Sistrunk testified:

> . . . If you will talk to us, we'll cooperate with you every way we can, and I told him, I said, "Do you want a lawyer, there's the phone. I'm not going to be hostile to you in anyway." I have a tendency to talk boisterous to people. That's my nature, and a lot of people take me wrong in doing that, but I'm known to be loud, and I was possibly was loud with him. I'm always loud.
> . . . .
> . . .I told him it would be best. It would make it lighter on yourself. I always feel that way.

At 11:00 p.m. on the same day, Sheriff Holliday and Auxiliary Deputy McCaleb talked with Davis when he was again advised of his rights and again signed a waiver of those rights. From this questioning, the sheriff obtained two signed statements from Davis admitting the rape. Sheriff Holliday testified that Davis did not make a request to contact his attorney, explaining as follows: "Whenever I read him his rights, and he signed that waiver of rights, he told me that he had spoken to his attorney, but he was still willing to talk to me at that time." Davis was indicted for rape on March 16, 1979, and arraigned on November 15, 1979. Trial began April 10, 1980.

Although Davis assigns numerous errors in the trial court, we are of the opinion only five of these errors warrant discussion as the remaining errors are believed to be without merit.

First, Davis contends the trial court failed to grant a speedy trial, violating his sixth amendment rights. Specifically, Davis asserts undue delay from the time of indictment, March 16, 1979, to the time of arraignment, November 15, 1979, and to the time of trial, April 10, 1980.

On April 3, 1980, Davis filed a motion to dismiss the

indictment based on the state's failure to bring him to trial within the 270 day time period of MCA §99-17-1 (Supp. 1980). This motion was overruled because the delay was the result of continuances granted.

We are of the opinion there was no untimely delay between the arraignment and trial date. MCA §99-17-1 (Supp. 1980) provides that "[u]nless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned."

Since the time prior to arraignment is not computed to determine compliance with this statute and less than 150 days passed between the date of arraignment and the date of trial, we conclude the State adequately met the 270 day limitation as set forth in §99-17-1. See Speagle v. State, 390 So. 2d 990 (Miss. 1980).

Moreover, the delay of 150 days is not unreasonable in view of the fact that the court below has two terms of criminal court each year, the March and November terms. Defendant cannot be heard to complain about the first continuance from the March 1979 to the November 1979 term because defense requested it to complete psychological tests of defendant. The State requested and was granted the continuance from the November 1979 term to the March 1980 term, so this delay was not incurred by the defendant; however, the continuance, in our opinion, was not unreasonable because the trial court found the District Attorney was required to be before the grand jury the entirety of that term and there were no assistant district attorneys to try the case at this term. Although the appellant now contends that he objected to this continuance we are unable to find any support for it in the record. We, therefore, think both

continuances were necessary and reasonable and within the sound discretion of the trial judge and surely not violative of MCA §99-17-1 (Supp. 1980), which permits continuances for good cause, as here.

Turning to the eight month delay from indictment to arraignment, Davis asserts it was the custom of the trial judge not to arraign criminal defendants unless they were to be tried at the term. Again there is no evidence of this in the record. We, therefore, are of the opinion the delay did not infringe on Davis' constitutional right to a speedy trial. We emphasize, however, the importance of early arraignment within a reasonable time. Although there is no evidence in the record to support the argument, the procedure of arraigning criminal defendants at the term set for trial, if true, has the potential to violate the defendant's right to a speedy trial through the four prong balancing test set forth in Barker v. Wingo, 407 U. S. 514, 92 S. Ct. 2182, 33 L. Ed. 101 (1972), and adopted in Wells v. State, 288 So. 2d 860, 862 (Miss. 1974), namely: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."

Presently, on balance, we are unable to state there was error in not dismissing the indictment. Although there was some testimony that the appellant's incarceration contributed to both his mental and physical deterioration, it was not conclusive upon the trial judge as he had other factors to consider in conjunction with it, such as the appellant's physical appearance and demeanor, the testimony of the deputies and the sheriff as to the appellant's mental and physical condition. We, therefore, are of the opinion the appellant's right to a speedy trial was not violated.

Davis also assigns as error the admission into evidence of the two signed confessions. There are two aspects of the admission of these statements which are troublesome, whether they were voluntarily given and whether there was an intelligent waiver of counsel.

The Pearl River County deputies and the sheriff testified in the suppression hearing concerning the arrest and questioning of Davis that no threats, coercion, or promise of reward was made to him. The trial judge ruled the confessions voluntary and thus admissible. After the suppression hearing and during the case-in-chief, Deputy Sistrunk stated on cross-examination by defense counsel that he had told Davis on the afternoon of March 9, 1979, that it would be best if he would cooperate, that it would be lighter for him. No contemporaneous motion to renew the motion to suppress was made nor was there any motion made at the close of the evidence. The point was not raised until Davis moved for a new trial after the verdict.

In Stubbs v. State, 311 So. 2d 339, 342 (Miss. 1975), we stated "[t]he trial court correctly held after preliminary inquiry that the confession was competent evidence and in the absence of a motion to exclude during the course of the trial, the testimony of the appellant only went to the weight and credibility of the confession." In Stubbs, a police officer had testified at a preliminary hearing that the defendant made a voluntary confession without threat, promises, or inducement. The defendant offered no evidence to refute the voluntariness of the confession. Thus the trial court admitted the testimony concerning the statement into evidence. In the trial-in-chief the defendant testified that he had requested the presence of his attorney during the questioning in which he made the statement, and this

request was denied. However, the defendant made no motion to exclude the testimony of the officer concerning the confession. This Court, finding no error in the admission of the confession at the hearing, held the defendant's testimony applicable only to the weight and credibility of the confession. Similarly, in this case, absent a contemporaneous motion to exclude during the trial, the objection to the admission of the confession was waived.

Davis cites a recent U. S. Supreme Court case, Edwards v. Arizona, 49 L. Week 4498 (May 19, 1981), as determinative of error in the admission of Davis' confessions. The Edwards case involved an oral confession of a man charged with murder. Edwards was arrested on January 19, 1976, and informed of his rights. After being told that another suspect had implicated him in the crime, Edwards indicated he wanted to "make a deal." After speaking briefly with the county attorney Edwards requested counsel. Questioning then ceased until the next morning when two detectives came to talk with Edwards. The jail guard informed him that the detectives wished to see him, but Edwards indicated that he did not want to talk to anyone. The guard then told Edwards that "he had" to talk with the detectives and took him to meet them. After the detectives read Edwards his rights, an oral confession was obtained from him. The U. S. Supreme Court held that Edwards had not made a valid waiver of his right to counsel, stating:

> . . . and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not

> subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police. Id. at 4498. (Emphasis added)

The circumstances in this case parallel rather closely the facts of Edwards, but with some significant differences. Both cases concern a second police-initiated interrogation, but here Davis made an express waiver of his right to remain silent while Edwards evidenced opposition to the interrogation. Moreover, in Edwards the second interrogation occurred before counsel had been made available to him. Yet here Davis' request for counsel was immediately complied with during the afternoon interrogation when the deputies phoned Davis' attorney and allowed Davis to talk with him, after which the interrogation ceased. Some nine hours later the sheriff and a deputy talked with Davis and obtained his confession. Although this interrogation was initiated by the sheriff, Davis was advised of his rights and waived them, indicating a willingness to talk. Comparison of these cases reveals both access to counsel and an express willingness to talk in this case which were not present in Edwards.

In Edwards the Court emphasized that "the voluntariness of . . . an admission on the one hand, and a knowing and intelligent waiver on the other, are discreet inquiries." Id. at 4497. The error in the Edwards' case, as we view it, lay in the state courts' failure to focus on whether Edwards intelligently and knowingly relinquished his right to counsel. Here the trial court in ruling on the motion to suppress made specific findings as to both voluntariness and knowing and intelligent relinquishment of rights.

The Edwards Court stressed throughout the opinion that the Court was not abandoning prior decisions, rather reconfirming

and emphasizing the importance of the Miranda safeguards surrounding an accused's right to counsel. In considering the factual distinctions between these two cases it appears to us that Edwards is not presently controlling because the record reveals that Davis' constitutional right to counsel was meticulously protected as required by Miranda and Edwards. We, therefore, think this assignment of error is without merit.

Davis next contends he was denied a fair and impartial trial by the failure of the State to establish the corpus delicti of the crime. The crime of rape consists of a person having carnal knowledge of a woman over the age of 12, against her will. MCA §97-3-65 (Supp. 1980). Thus, it is necessary that both aspects of the act - carnal knowledge and force - be proved by the State.

The prosecutrix testified that the defendant after pulling a pillowcase over her head "turned me over and forced me to have sexual intercourse. What I mean by sexual intercourse is he forced his penis into my vagina." This Court has stated "that the testimony of the victim of a rape may be sufficient to support a guilty verdict where the victim's testimony is neither contradicted nor discredited by other evidence or by surrounding circumstances." Dubose v. Mississippi, 320 So. 2d 773, 774 (Miss. 1975). The testimony of the prosecutrix was corroborated by witnesses who knew Davis and saw him, as well as his truck, in the vicinity of the prosecutrix' home at the time.

The prosecutrix also testified the sexual intercourse with Davis was against her will, stating that she struggled with him, was pushed to the floor, that she screamed, and was threatened with harm if she didn't cooperate. Although no signs of external injury or sperm were found, the presence of either

is not considered absolutely determinative of rape. "The rule is that physical force on the part of the assailant, or physical resistance on the part of the victim, is not necessary if the proof shows beyond a reasonable doubt that the female surrendered because of fear arising out of a reasonable apprehension of great bodily harm." Fields v. State, 293 So. 2d 430, 432 (Miss. 1974). The testimony of the prosecutrix evidenced a reasonable apprehension of bodily harm. The examining physician testified that his examination was complicated by the douche and by menstrual bleeding. All that was necessary for the crime was "some penetration of the female's private parts by the sexual organ of the assailant." Lang v. State, 230 Miss. 147, 158, 87 So. 2d 265, 268 (1956). The testimony of the prosecutrix, corroborated by the surrounding circumstances and other evidence, was sufficient, in our opinion, to prove the corpus delicti of the crime.

The appellant also contends there was reversible error because the trial court refused to grant a mistrial when the assistant prosecutor in the closing argument was allowed to comment on the failure of the defendant to testify in his own behalf. Since defense counsel did not preserve the closing argument for the record by a bill of exceptions or otherwise, we must assume the court's ruling in this regard correct. The trial court dictated into the record the following:

> Let the record show that the Assistant Attorney was arguing the case, and in his argument of speaking of the times that the statements were made by the defendant and in reference to those statements, he made the statement that all the defendant had to do at that time was deny that he had committed the offense. Upon him stating that, the defense attorneys have now moved the Court for a mistrial. The Court finds that the statements made by the Assistant District Attorney were made in regard to 9 March, '79, and in the early morning of 10 March, 1979, and in conjunction with the

> statements that were made to the Sheriff and the other witness at said time and place and were not in any manner referring to any other time, place, circumstance or situation, and for this reason, the motion be and the same is hereby overruled.

If the attorney's statement could reasonably be construed by the jury as a comment on Davis' failure to testify, then it would be immaterial that the attorney intended to refer to a situation other than the trial-in-chief. Reddick v. State, 72 Miss. 1008, 16 So. 490 (1895). Without the precise words of the argument or the context in which it was made, we have difficulty in determining a reasonable construction of the statement or in determining possible prejudicial effect on the jury's verdict. In this situation we must assume the trial court properly resolved the question as indicated by his above statements. In reaching this conclusion we note the testimony that Davis first denied his participation in the crime but later confessed, a fact which possibly evoked the comment. Nor do we have, as did the trial court, the benefit of defense counsel's argument which might have prompted the comment of the assistant district attorney in reply. In any event we have long declined to rule on matters not preserved in the record in sufficient detail for purposes of appeal. Shelton v. Kindred, 279 So. 2d 642 (Miss. 1973). Thus, we conclude this contention to be without merit.

Finally the appellant contends that he was greatly prejudiced by the sheriff's presence in the courtroom after the rule had been invoked, particularly since the sheriff was a witness in the case. While it is true that Davis objected to the sheriff's presence after the rule had been invoked, nevertheless the sheriff was exempted by the court because he was needed in the courtroom. The judge gave the following explanation:

> . . . [D]uring most of this trial, because of the other deputies being under the rule, the Sheriff has been the only law enforcement official

in the Courtroom and available to the Court and has been performing his normal duties as Sheriff during the trial of this cause.

There is no suggestion by the defendant, as we view the record, that the sheriff acted with any impropriety, the only contention being that he must have heard the other witnesses testify; and therefore, we suppose, in some fashion not pointed out, either altered his testimony or by his very presence prejudiced the jury. We do not ascertain from our research of the record or from this argument that the trial judge in any way abused his discretion in permitting the sheriff to remain in the courtroom. Fondren v. State, 253 Miss. 241, 175 So. 2d 628 (1965). The present factual situation does not rise to the proportions of those in Dunn v. State, 264 So. 2d 823 (Miss. 1972), Perkins v. State, 244 So. 2d 414 (Miss. 1971), or Smith v. State, 251 Miss. 241, 169 So. 2d 451 (1964).

We have meticulously examined the other assignments of error and find them without merit. In sum, the record reveals sufficient credible evidence to support the jury's verdict and there being no prejudicial error in the record in our opinion, the cause is affirmed.

AFFIRMED.

SMITH, P.J., ROBERTSON, P.J., SUGG, WALKER, BROOM, LEE AND BOWLING, JJ., CONCUR. HAWKINS, J., DISSENTS.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 52,659

MALCOLM JOE DAVIS

V.

STATE OF MISSISSIPPI

HAWKINS, JUSTICE, DISSENTING:

Respectfully, I must dissent.

Mississippi Code Annotated § 13-1-9 (1972) requires, and this Court has held in numerous decisions, that no comment whatsoever shall be made upon the defendant's failure to testify in a case. We have gone further and held no comment can be made which could be construed by the jury as a comment on failure by the accused to testify. Brown v. State, 340 So. 2d 718 (Miss. 1976); Lambert v. State, 199 Miss. 790, 25 So. 2d 477 (1946); Reddick v. State, 72 Miss. 1008, 16 So. 490 (1895).

As this Court stated in Prince v. State, 93 Miss. 263, 46 So. 537 (1908), the jury cannot avoid being keenly cognizant of the defendant's failure to testify, and the defendant being manifestly the one person most interested in the outcome of the case, the jury can only wonder why he did not testify. To make any kind of comment that can be construed as a statement to the jury as "Well, if he was not guilty, he could have denied it," can only result in serious prejudice to the defendant's statutory and Constitutional rights under the Fifth Amendment to the Constitution.

The Court stated in pertinent part:

> . . .The Assistant Attorney was arguing the case, and in his argument of speaking of the times that the statements were made by the defendant and in reference to those statements, he made the statement that all the defendant had to do at that time was deny that he had committed the offense.

For twelve jurors under those circumstances to restrict their thoughts solely to the defendant's statements to the law officials, and not also instantly be alerted by this comment the defendant could have denied his guilt as a witness from the witness chair, each would first require a lobotomy. In my view, the statement by the assistant prosecutor can only be construed as a comment on the failure of the defendant to testify.

This Court has taken pains so often to warn and urge prosecuting attorneys to refrain from any comment of this nature. It is also probably true that most cases of this nature never reach this Court because the trial judges as a rule declare a mistrial on the spot. That, at least, has been the experience of the author of this dissent, as a district attorney and an observer of criminal trials over the years. In this particular record, with the proof of the guilt of the defendant so strong, it was as strange as it was unnecessary to make the comment made by the state.

The learned trial judge in this case I am sure did everything possible to prevent the unfortunate inference being impressed upon the jurors' minds, but I think the inference inescapable and unavoidable.

I specially concur with the majority opinion relative to the confession of the defendant. Ordinarily, any statement made by a law enforcement officer to an accused, as was made in this case, that it would be better for him to cooperate and "it would be lighter for him," would taint the admission or confession and render it totally incompetent. Citation of authority is unnecessary to this well-settled proposition of law.

In this case, however, the revelation that such a promise had been made to the accused was first elicited from the officer during the trial by defense counsel on cross-examination. Yet, counsel made no objection, no motion to exclude the confession, and the first we learn of his taking umbrage from such disclosure was in the motion for a new trial. We can only assume defense counsel either approved or was unperturbed. To wait until the jury has returned a verdict of guilty before voicing any complaint was somewhat late, and the accused thereby clearly waived a definite right that he once had to object.

IC

PHONE 354-6014
354-6018
354-6020

From The Office Of:

ROBERT E. WOMACK
Supreme Court Clerk
3rd Floor, Gartin Bldg.
Jackson, Miss. 39202

December 16, 1981

RE: MALCOLM JOE DAVIS V. STATE
#52,659

TO: WHOM IT MAY CONCERN

The Court this date denied the petition for rehearing in this case. However, the opinion previously rendered on 9-9-81 as written by Chief Justice Patterson has been modified as of this date. Attached are copies of corrected pages 4, 7, 9 & 10. Please see that same are substituted into the copy of the opinion furnished you as of 9-9-81.

lp

Sistrunk phoned Davis' attorney and Davis conferred with him over the phone. Some interrogation was continued that afternoon but no prejudicial or incriminating statements were obtained from Davis, although Deputy Sistrunk later testified at trial that at some time in the afternoon he encouraged Davis to cooperate. Sistrunk testified:

> . . .If you will talk to us, we'll cooperate with you every way we can, and I told him, I said, "Do you want a lawyer, there's the phone. I'm not going to be hostile to you in anyway." I have a tendency to talk boisterous to people. That's my nature, and a lot of people take me wrong in doing that, but I'm known to be loud, and I was possibly was loud with him. I'm always loud.
> . . . .
>
> . . .I told him it would be best. It would make it lighter on yourself. I always feel that way.

At 11:00 p.m. on the same day, Sheriff Holliday and Auxiliary Deputy McCaleb talked with Davis when he was again advised of his rights and again signed a wiaver of those rights. From this questioning, the sheriff obtained two signed statements from Davis admitting the rape. Sheriff Holliday testified that Davis did not make a request to contact his attorney, explaining as follows: "Whenever I read him his rights, and he signed that waiver of rights, he told me that he had spoken to his attorney, but he was still willing to talk to me at that time." Davis was indicted for rape on March 16, 1979, and arraigned on November 15, 1979. Trial began April 10, 1980.

Although Davis assigns numerous errors in the trial court, we are of the opinion only five of these errors warrant discussion as the remaining errors are believed to be without merit.

First, Davis contends the trial court failed to grant a speedy trial, violating his sixth amendment rights. Specifically, Davis asserts undue delay from the time of indictment, March 16, 1979, to the time of arraignment, November 15, 1979, and to the time of trial, April 10, 1980.

On April 3, 1980, Davis filed a motion to dismiss the

Davis also assigns as error the admission into evidence of the two signed confessions. There are two aspects of the admission of these statements which are troublesome, whether they were voluntarily given and whether there was an intelligent waiver of counsel.

The Pearl River County deputies and the sheriff testified in the suppression hearing concerning the arrest and questioning of Davis that no threats, coercion, or promise of reward was made to him. The trial judge ruled the confessions voluntary and thus admissible. After the suppression hearing and during the case-in-chief, Deputy Sistrunk stated on cross-examination by defense counsel that he had told Davis on the afternoon of March 9, 1979, that it would be best if he would cooperate, that it would be lighter for him. No objection to the introduction of the confession was made at that time based on the ground that, "it would make it lighter on yourself." The point was not raised until Davis moved for a new trial after the verdict.

In Stubbs v. State, 311 So. 2d 339, 342 (Miss. 1975), we stated "[t]he trial court correctly held after preliminary inquiry that the confession was competent evidence and in the absence of a motion to exclude during the course of the trial, the testimony of the appellant only went to the weight and credibility of the confession." In Stubbs, a police officer had testified at a preliminary hearing that the defendant made a voluntary confession without threat, promises, or inducement. The defendant offered no evidence to refute the voluntariness of the confession. Thus the trial court admitted the testimony concerning the statement into evidence. In the trial-in-chief the defendant testified that he had requested the presence of his attorney during the questioning in which he made the statement, and this

> subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police. Id. at 4498. (Emphasis added)

The circumstances in this case parallel rather closely the facts of Edwards, but with some significant differences. Both cases concern a second police-initiated interrogation, but here Davis made an express waiver of his right to remain silent while Edwards evidenced opposition to the interrogation. Moreover, in Edwards the second interrogation occurred before counsel had been made available to him. Yet here Davis' request for counsel was immediately complied with during the afternoon interrogation. The officer telephoned Davis' attorney and permitted him to speak with the attorney. After talking with the attorney, Davis reported to the officer that the attorney would come to the sheriff's office that afternoon and confer with him; however, the attorney did not come to the sheriff's office that afternoon and did not confer with Davis that date except in the telephone conversation. Some nine hours later the sheriff and a deputy talked with Davis and obtained his confession. Although this interrogation was initiated by the sheriff, Davis was advised of his rights and waived them. Davis told the sheriff he had spoken to his attorney, but he was still willing to talk to the sheriff at that time. We conclude that after Davis' counsel failed to appear in the afternoon, he willingly waived the presence of counsel and willingly answered questions of the sheriff. Comparison of these cases reveals both access to counsel and an express willingness to talk in this case which were not present in Edwards.

In Edwards the Court emphasized that "the voluntariness of . . . an admission on the one hand, and a knowing and intelligent waiver on the other, are discreet inquiries." Id. at 4497. The error in the Edwards' case, as we view it, lay in the state courts' failure to focus on whether Edwards intelligently and knowingly relinquished his right to counsel. Here the trial court in ruling on the motion to suppress made specific findings

as to both voluntariness and knowing and intelligent relinquishment of rights.

The Edwards Court stressed throughout the opinion that the Court was not abandoning prior decisions, rather reconfirming and emphasizing the importance of the Miranda safeguards surrounding an accused's right to counsel. In considering the factual distinction between these two cases it appears to us that Edwards is not presently controlling because the record reveals that Davis' constitutional right to counsel was meticulously protected as required by Miranda and Edwards. We, therefore, think this assignment of error is without merit.

Davis next contends he was denied a fair and impartial trial by the failure of the State to establish the corpus delicti of the crime. The crime of rape consists of a person having carnal knowledge of a woman over the age of 12, against her will. MCA § 97-3-65 (Supp. 1980). Thus, it is necessary that both aspects of the act - carnal knowledge and force - be proved by the State.

The prosecutrix testified that the defendant after pulling a pillowcase over her head "turned me over and forced me to have sexual intercourse. What I mean by sexual intercourse is he forced his penis into my vagina." This Court has stated "that the testimony of the victim of a rape may be sufficient to support a guilty verdict where the victim's testimony is neither contradicted nor discredited by other evidence or by surrounding circumstances." Dubose v. Mississippi, 320 So. 2d 773, 774 (Miss. 1975). The testimony of the prosecutrix was corroborated by witnesses who knew Davis and saw him, as well as his truck, in the vicinity of the prosecutrix' home at the time.

The prosecutrix also testified the sexual intercourse with Davis was against her will, stating that she struggled with him, was pushed to the floor, that she screamed, and was threatened with harm if she didn't cooperate. Although no signs of external injury or sperm were found, the presence of either

IN THE SUPREME COURT OF MISSISSIPPI

NO. 52,659

MALCOLM JOE DAVIS

APPELLANT

V.

STATE OF MISSISSIPPI

APPELLEE

PETITION FOR REHEARING

F. Kent Stribling
309 Barnett Building
Jackson, MS. 39201

David R. Smith
Smith, Smith, Tate & Stuart
Post Office Box 393
Poplarville, Mississippi 39470

Dixon L. Pyles
Pyles & Tucker
507 East Pearl Street
Jackson, Mississippi 39201

IN THE SUPREME COURT OF MISSISSIPPI

NO. 52,659

MALCOLM JOE DAVIS

APPELLANT

V.

STATE OF MISSISSIPPI

APPELLEE

PETITION FOR REHEARING
(Oral Argument Requested)

Malcolm Joe Davis, appellant, petitions the court for a rehearing of his appeal to correct the erroneous statements of facts and conclusions of law in the opinion of the court released September 9, 1981. Following the rehearing, Davis requests the court to withdraw the present opinion, render a decision which reverses the judgment of the Pearl River Circuit Court; vacates the sentence, dismisses the indictment and discharges the appellant. As grounds, the appellant assigns the following errors of fact and of law;

1. The court erroneously stated (p. 3) that four knee high stockings were found under the bridge and that the containers were found in Davis' truck after the law enforcement officer "gained permission to look in Malcolm's truck". No knee high stockings were found under the bridge nor were any knee high containers found in Davis' truck.

2. The court ignored the facts that the prosecutrix:

(a) On March 9, 1981, signed a John Doe affidavit signifying she did not know the identity of the assailant;

(b) failed to point out Davis as her assailant in front of her husband's office on March 9, 1981, although she said at the trial that she saw and recognized him;

(c) failed to call attention of the law enforcement officer that Davis was her assailant although she said at the trial she saw him outside of the hospital on March 9, 1979.

3. Contrary to the statements in the opinion of the court that: "No interrogation occurred that afternoon" (p. 4) and "yet here Davis request for counsel was immediately complied with during the afternoon interrogation when the deputies phoned Davis' attorney and allowed Davis to talk with him, after which the interrogation ceased," (p. 9) the evidence is conclusive that law enforcement officers Mason Sistrunk, Hooper Farmer, Joe McCaleb and Ulmer Lumpkin (R 642) continuously interrogated Davis from 2:00 p.m., the time Davis expressed his desire to deal with the officers only through counsel, until 6:00 p.m., and from 11:00 p.m. to 2:00 a.m. on March 10, 1979, although counsel was never present nor available to him during the seven hour period of interrogation.

4. The Mississippi Supreme Court erroneously gave a strained effect to the procedural "contemporaneous objection" rule; chose to depart from its prior holdings; applied a stricter rule against the appellant; ignored the fundamental and constitutional rights of Davis; and denied him "due process." The holding that "absent a contemporaneous motion to exclude during the trial, the objection to the admission of the confession was waived," gives "effect to the contemporaneous-objection rule for its own sake" and forces "resort to an arid ritual of meaningless form." The law conclusively presumes that Davis was influenced to confess as a result of the inducement held out by Sistrunk, a person in authority, and the Mississippi Supreme Court should have held that the confessions should have been excluded by the trial court on the grounds of public policy. Davis' constitutional rights in this serious criminal case rises above mere rules of procedure. Factors affecting Davis' fundamental rights are exceptions to the rule that questions not raised in the trial court cannot be raised for the first time on appeal.

5. The Mississippi Supreme Court misapplied the requirements of Miranda v. Arizona, 384 U. S. 346, 86 S. Ct. 1602, 16 L Ed 2d 694, and Edwards v. Arizona, ____ U. S. ____, 101 S.Ct. 1880, 68 L Ed 2d 378, because the use of Davis' two confessions against him at his trial violated his right under the Fifth and Fourteenth Amendments to have counsel present during custodial interrogation. Having exercised his right at 2:00 p.m. on March 9, 1979, to have counsel present during interrogation Davis did not waive that right during the interrogation that began at 11:00 p.m. and concluded at 2:00 a.m. on March 10, 1979. Rule 6, Miss. Sup. Ct. Rules provides ... "the Court may, at its option, notice a plain error ..." .

6. The Mississippi Supreme Court and the Pearl River Circuit Court applied an erroneous standard for determing Davis' alleged waiver of his right to counsel by focusing on the voluntariness of the two confessions rather than on whether the appellant understood his right to counsel and intelligently relinquished it.

7. Davis' rights under Amendments V and XIV to the Constitution of the United States were also violated by the Mississippi Supreme Court in its decision dated September 9, 1981, wherein it held that nine hours after the appellant expressed his desire to deal with the law enforcement officers only through counsel, the sheriff and a deputy again initiated a three hour period of interrogation and obtained two confessions from him despite the fact that Davis' counsel had never been present during any of the seven hours of questioning conducted by five different law enforcement officers. Davis stated at 2:00 p.m. on March 9, 1979, that he wished to remain silent; that he wanted his attorney present, and that his attorney was coming to Picayune. When Davis said he did not want to talk about the rape and requested counsel, he had the right to have counsel present and with him during any and all subsequent "interrogation."

8. In the September 9, 1981, decision the Mississippi Supreme Court erred in holding that the State established the corpus delicti of rape when there was not a scintilla of evidence in the record to suggest that the prosecutrix was in fear of great bodily harm and that such fear motivated her not to continue to physically resist or that she resisted to the utmost within her power and ability.

9. The Mississippi Supreme Court erred in the September 9, 1981, decision (pp. 12, 13) in:

(a) refusing to hold that the argument of the assistant prosecutor, as stated by the trial judge, "That all the defendant had to do at that time was to deny he committed the offense," violated Davis' rights pursuant to Amendment V and Mississippi Code 1972 Annotated (MCA) § 13-1-19;

(b) justifying the comment by speculating that Davis' denial of his participation in the crime and his later confessions of the rape possibly evoked the comment;

(c) conjecturing that "defense counsel's argument ... might have prompted the comment of the assistant district attorney in reply." (p. 12) The assistant prosecutor made the statements in the opening arguments to the jury before defense counsel made any argument.

(d) failing to reverse and remand the case on this ground alone.

10. The Mississippi Supreme Court erred in the September 9, 1981, decision in:

(a) refusing to hold that the delay of 399 days between Davis' arrest and the beginning of his trial violated his Sixth Amendment rights to a speedy trial.

(b) failing to hold that MCA § 99-17-1, under the circumstances existing in this case is unconstitutional on its face and as applied.

(c) holding that the failure of Pearl River County to have a prosecuting attorney available at the November, 1979,

term in a timely manner justified a continuance "for good cause," (p. 6)

(d) refusing to hold that the delay of 399 days between arrest and trial gave prima facie merit to Davis' challenge to the lack of a speedy trial;

(e) refusing to hold from the uncontradicted evidence of the psychological expert that Davis' incarceration contributed to "his mental and physical condition" and in accepting the lay testimony of the law enforcement officers elicited by leading questions that the appellant appeared "normal;"

11. The Mississippi Supreme Court erred in the decision dated September 9, 1981:

(a) in refusing to consider that the excessive and inaccurate comments of the trial judge in the hearing of the jury was a form of evidence which changed the factual matrix within which the jury customarily operates and insured a verdict of guilty;

(b) in refusing to consider and find that the State failed to discharge its affirmative duty to provide Davis a special venire composed of a representative cross section of Pearl River County;

(c) in refusing to consider and find that Davis was prejudiced by the display before the jury of articles not thereafter introduced into evidence, and that the record presents circumstances of bad faith and prejudicial misconduct.

Dated: October 8, 1981.

Respectfully submitted,

MALCOLM JOE DAVIS - APPELLANT - PETITIONER

By _____
Of Counsel

By _____
Of Counsel

F. Kent Stribling
309 Barnett Bldg.
Jackson, MS. 39201

David R. Smith
Smith, Smith, Tate & Stuart
P. O. Box 393
Poplarville, MS. 39470

Dixon L. Pyles
Pyles & Tucker
507 E. Pearl St.
Jackson, MS. 39201

Attorneys for Appellant-Petitioner

CERTIFICATE

The undersigned hereby certifies that on the date set forth hereinafter a true copy of the foregoing Petition For Rehearing was personally delivered to:

Honorable Bill Allain
Attorney General of Mississippi
Gartin Building
Jackson, Mississippi

Dated: October 8, 1981.

DIXON L. PYLES

IN THE CIRCUIT COURT OF PEARL RIVER COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VS. NO. 4839

MALCOM DAVIS

MOTION TO DISMISS INDICTMENT

Comes now the Defendant, Malcom J. Davis, by his attorneys of record, and respectfully moves the Court to dismiss the indictment in the above styled and numbered cause returned against him by the grand jury of Pearl River County, Mississippi, at the March 1979 term of the Circuit Court thereof, and in support of said motion respectfully shows unto the court as follows, to-wit:

1. That the defendant, Malcom Joe Davis, was indicted by the grand jury of Pearl River County for rape on March 9, 1979, and was served with a capias and copy of the indictment on March 16, 1979. That his case was set for call before this honorable court on March 26, 1979. That said defendant has been in the lawful custody of Pearl River County, Mississippi, from the date of his arrest on March 9, 1979, until the present time.

2. That Section 99-17-1 of the Mississippi Code of 1972, as annotated and amended, provides that unless good cause be shown and continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned.

3. That more than two hundred seventy (270) days have passed from the time of the first appearance of the defendant on March 26, 1979, and the failure to bring the defendant to trial within said time denies the defendant his constitutional rights to a speedy trial as provided by Amendment Six and Fourteen of the Constitution of the United

States and the laws of the state of Mississippi applicable thereto.

4. That Pearl River County Circuit Court has five terms of court: second Monday of March; second Monday of April; third Monday of June; third Monday of September; and the first Monday of November. Therefore, under the Sixth and Fourteenth Amendments of the Constitution of the United States, as a matter of due process of law, guaranteed to him by said Constitution of the United States, the defendant has been deprived of his right to a speedy trial, while being detained in jail without bail.

And this indictment should be dismissed and Appellant discharged according to the ruling of the Supreme Court of Mississippi in Payne vs. State, 363 So. 2d 278.

WHEREFORE, the defendant respectfully moves the Court to hear this motion prior to the trial of this case on the merits and that at the conclusion of the testimony, the court will order the indictment dismissed as provided by Section 99-17-1 of the Mississippi Code of 1972, as amended, and the Sixth and Fourteenth Amendments of the Constitution of the United States.

RESPECTFULLY SUBMITTED,

BY: _____
Of Counsel

DIXON L. PYLES
507 East Pearl Street
Jackson, Mississippi 39201

DAVID SMITH
SMITH, SMITH, TATE & STUART
P. O. Box 393
Poplarville, Mississippi 39470

F. KENT STRIBLING
309 Barnett Building
Jackson, Mississippi 39201

CERTIFICATE

I, one of the attorneys representing the Defendant herein, do hereby certify that I have on this day, mailed, postage prepaid, a true and correct copy of the foregoing

SE

Motion to Dismiss Indictment to Honorable Philip Stingley, District Attorney, Post Office Box 642, Columbia, Mississippi 39429.

This the _____ day of _____, 1980.

_____
ATTORNEY FOR DEFENDANT

THE FOLLOWING PROCEEDINGS WERE HAD IN CHAMBERS ON APRIL 7, 1980.

BY THE COURT:

All right, first, this cause coming on to be heard first on stipulation between the State of Mississippi and counsels for the defendant, the State of Mississippi by and through the District Attorney, Philip Singley and the defense by and through the attorneys of record, Dixon L. Pyles, David R. Smith and F. Kent Stribling, and both the State and the defense agreeing to waive the two attorney per side participation in the trial in this cause and allowing each side to use three attorneys as active participates in the trial of this matter. Those attorneys to be, for the State of Mississippi, Honorable Philip Singley, District Attorney of the 15th Judicial District, Honorable Richard Douglass, Assistant District Attorney of the 15th Judicial District and Honorable Claiborne McDonald, III, County Attorney of Pearl River County, Mississippi. The three attorneys participating for the defense will be Honorable Dixon L. Pyles, Honorable David R. Smith and Honorable F. Kent Stribling.

Now, the next matter coming on before the Court and all parties having agreed that all motions heretofore filed have been disposed of by order of the Court except as to the Motion to Suppress Confessions and or oral Statements of the Defendant, and the State, the Defense and the Court all agree that those motions will be taken up during the trial and in the absense of the jury. That before the Court is the motion to dismiss this indictment; that the State of Mississippi and the Defense agree that there are certain items and allegations setout

in said motion that are inadvertently incorrect and that the Court will now take the motion paragraph by paragraph and state the facts as the Court docket and the Court file reflect them to be and at the conclusion of this statement, the Court will then rule on the motion as stated into the record by the Court.

Now, as to Paragraph 1 of said motion, the indictment in this cause shows that said indictment was returned on the 16th day of March, 1979, and that Malcolm Joe Davis was served with a copy of said indictment and capias on March the 16th, 1979; that the Court does find that his case was set for call during the March, 1979 Term of this Court which began on the 2nd Monday of March, 1979, and was for a period of seven weeks; that the Court finds that during said term, and being on the 25th day of April, 1979, there was filed in this cause a motion for continuance by Malcolm Davis, by and through David R. Smith, one of his attorneys of record; that said motion states that pursuant to motions and orders of this Court, the Defendant had been transferred to Hines County and ordered to undergo psychiatric and polygraph examinations by examiners of Defendant's own choosing; that said motions showed that said examinations were not completed in the time contemplated and that further time was needed to complete the examinations and testing and a continuance was necessary; that on the 26th day of April, 1979, by order of this Court, the continuance was granted and this cause was continued to the next term of this Court, the same being the November, 1979 Term. All as reflected and setout in said order granting continuance; that subsequent to said continuance and during the month of August and

September, 1979, there were motions and orders filed for additional psychiatric examinations of the defendant at the request of the defendant and by the doctor of defendant's choosing. At the November, 1979 Term of this Court, there was filed on November the 13th, 1979, a motion for continuance by the State of Mississippi; that said motion asking for a continuance of this cause until the next regular term of this Court and as basis for said motion, the State showed that the Grand Jury at the November, 1979 Term met, and the Court records will reflect; that said Grand Jury met the entire three weeks of said Court term; that during the November, 1979 term, there were no assistant district attorneys in the 15th Judicial District and that Honorable Richard Douglass having been appointed Assistant District Attorney pursuant to statue effective January the 1st of 1980, and that no assistant district attorneys were provided for prior to January 1, 1980; that because the District Attorney's presence was required to be with the Grand Jury during the entire three weeks of the November, 1979 Term, there were no criminal cases tried during said term, and the State was granted a continuance as shown by order entered herein on November the 13th, 1979.

Let the record further show that said motion was sustained by the Court and so shows on the Court docket; that through inadvertence or oversight, the Court was not furnished with a written order sustaining said motion, although the District Attorney has the original in his possession at this time and counsel for the defendant agree that the State was entitled to having entered a written order, at that the same was not entered either through

in said motion that are inadvertently incorrect and that the Court will now take the motion paragraph by paragraph and state the facts as the Court docket and the Court file reflect them to be and at the conclusion of this statement, the Court will then rule on the motion as stated into the record by the Court.

Now, as to Paragraph 1 of said motion, the indictment in this cause shows that said indictment was returned on the 16th day of March, 1979, and that Malcolm Joe Davis was served with a copy of said indictment and capias on March the 16th, 1979; that the Court does find that his case was set for call during the March, 1979 Term of this Court which began on the 2nd Monday of March, 1979, and was for a period of seven weeks; that the Court finds that during said term, and being on the 25th day of April, 1979, there was filed in this cause a motion for continuance by Malcolm Davis, by and through David R. Smith, one of his attorneys of record; that said motion states that pursuant to motions and orders of this Court, the Defendant had been transferred to Hines County and ordered to undergo psychiatric and polygraph examinations by examiners of Defendant's own choosing; that said motions showed that said examinations were not completed in the time contemplated and that further time was needed to complete the examinations and testing and a continuance was necessary; that on the 26th day of April, 1979, by order of this Court, the continuance was granted and this cause was continued to the next term of this Court, the same being the November, 1979 Term. All as reflected and setout in said order granting continuance; that subsequent to said continuance and during the month of August and

September, 1979, there were motions and orders filed for additional psychiatric examinations of the defendant, at the request of the defendant and by the doctor of defendant's choosing. At the November, 1979 Term of this Court, there was filed on November the 13th, 1979, a motion for continuance by the State of Mississippi; that said motion asking for a continuance of this cause until the next regular term of this Court and as basis for said motion, the State showed that the Grand Jury at the November, 1979 Term met, and the Court records will reflect; that said Grand Jury met the entire three weeks of said Court term; that during the November, 1979 term, there were no assistant district attorneys in the 15th Judicial District and that Honorable Richard Douglass having been appointed Assistant District Attorney pursuant to statue effective January the 1st of 1980, and that no assistant district attorneys were provided for prior to January 1, 1980; that because the District Attorney's presence was required to be with the Grand Jury during the entire three weeks of the November, 1979 Term, there were no criminal cases tried during said term, and the State was granted a continuance as shown by order entered herein on November the 13th, 1979.

Let the record further show that said motion was sustained by the Court and so shows on the Court docket; that through inadvertence or oversight, the Court was not furnished with a written order sustaining said motion, although the District Attorney has the original in his possession at this time and counsel for the defendant agree that the State was entitled to having entered a written order, at that the same was not entered either through

oversight or inadvertence..

All right, as to Paragraph 2 of said motion to dismiss the indictment, Section 99-17-1 of the Mississippi Code of 1972, will be taken and considered by the Court as written.

All right, Paragraph 3, in addition to the matters alleged in Paragraph 3 and in order to complete the motion, let that paragraph also show that this defendant was arraigned on November the 15th, 1979, and this was the first time that the Court was requested by the defendant or defendant's counsel for an arraignment, and that the Court did arraigne said defendant at the request of his counsel the first time the Court was apprised of the defendant's desire to be arraigned.

As to Paragraph 4 of said motion, let the record show that Pearl River County Circuit Court has two criminal terms of Court; the same being the 2nd Monday of March for seven weeks and the other term being the 1st Monday of November for three weeks; that Pearl River County, since March Term of 1979, has not had an April Term of Court as the same was combined with the then existing March Term to make the seven week term that now commenses on the 2nd Monday of March; that the June and September are each two week terms of Court and each specified by statue to be for civil business only; that the facts of this case are that the defendant was indicted at the March, 1979 Term and upon his motion for continuance being granted, that motion and in the order granting the motion, show that said cause was continued to the November, 1979 Term; that upon the State's motion for a continuance, this cause was

continued to the March, 1980 Term of the Pearl River County Circuit Court; that only one criminal term of the Pearl River County Circuit Court has intervened since the indictment of the defendant and in this term, the case is presently set for trial in.

Let the record further show that during the November, 1979 Term of Court, this case was pre-set for April the 10th, 1980.

The Court will now rule on the motion to dismiss as amended and changed by the statements already in the record; that the State of Mississippi and Defense Counsel agreeing that the statement made by the Court is a true statement of the facts, events and circumstances of this case from the indictment, up to and including today; that based on the above and foregoing facts, the motion to dismiss the indictment be and the same is hereby overruled.

Bob, let the record show that by agreement and consent of the Court, the State of Mississippi and the defense do hereby stipulate and agree that the defendant Malcolm Joe Davis was born--

BY MR. PYLES:

March the 9th, 1947.

BY THE COURT:

--And that his age at the time of the alleged crime was thirty-two years of age.

****

IN THE CIRCUIT COURT OF PEARL RIVER COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VS. NO. 4839

MALCOM JOE DAVIS

MOTION FOR NEW TRIAL

Comes now, Malcom Joe Davis, defendant, by his attorneys, and moves the court to set aside the verdict of the jury and the judgment therein entered and to grant unto him a new trial, and in support of his said motion, assigns the following grounds, to-wit:

1. The court erred in admitting testimony and evidence offered by the State over the objections of the defendant in each and every instance, as shown by the stenographic record of the trial and proceedings therein, reference thereto being made in aid thereof.

2. The court erred in sustaining the objections of the State to the testimony and evidence offered on behalf of the defendant in each and every instance, as shown by the stenographic notes of the trial and proceedings therein, reference thereto being made in aid thereof.

3. The court erred in refusing the defendant's motion for dismissal and acquittal made at the conclusion of the State's case.

4. The court erred in allowing, over the defendant's objection, the Sheriff of Pearl River County, while serving as a court bailiff, to remain inside the courtroom and to hear the evidence and testimony of the other witnesses prior to his testifying as a witness to prove the two signed confessions of the defendant.

5. The court erred in allowing into evidence the confessions of the defendant introduced during the trial by the State, over defendant's objection, as having been made after he had been promised leniency, hope of reward, and

assistance for his cooperation by the district attorney's investigator, an agent for the State, and after the defendant had been interrogated over a long period of time and into the early hours of the morning and at a time when he was tired and sleepy and unable to resist pressure placed on him by the Sheriff and his deputy.

6. The court further erred in allowing the confessions of the defendant over the objection of the defendant as having been made at a time when he was unable to resist stress and psychological pressure from the interrogating officers.

7. The court erred in refusing to grant the motion of the defendant for a mistrial when the State's witness, Mason Sistrunk, exhibited certain pieces of evidence to the jury at a time when it had not been offered and which was never offered nor ruled as admissible.

8. The court further erred in allowing the prosecution to expose all the State's evidence to the jury and then to refuse to offer it for a ruling as to the admissibility thereof which denied the defendant his right to cross-examination and which prejudiced the defendant's right to a fair and impartial trial.

9. The court erred in failing to sustain the defendant's motion for dismissal at the conclusion of the State's case in that the State had wholly failed to prove the elements of forcible rape in said case.

10. The verdict of the jury and the judgment entered thereon are contrary to and against the overwhelming weight of the credible evidence and testimony in this case, as shown by the stenographic notes of said evidence and testimony, reference thereto being made in aid thereof.

11. The verdict of the jury is contrary to the weight of the evidence herein and evinces bias and prejudice on the part of the jury against the defendant.

12. The court erred in failing to give the defendant a trial at the November, 1979 term of the Circuit Court of

Pearl River; in denying defendant's motion to dismiss based on the violation of defendant's rights under Amendment VI of the Constitution of the United States and Article 26 of the Mississippi Constitution of 1890; and for failing to bring this case to trial within 270 days after the defendant was accused of the crime; and more than 270 days after the defendant appeared in court for arraignment.

13. The court erred in failing to grant the motion of the defendant to suppress the special venire.

14. The assistant prosecutor, during his summation in the trial, commented on the defendant's failure to testify in his own behalf and the court erred in denying the defendant's motion for mistrial.

And for other grounds apparent on the facts of the record.

WHEREFORE, defendant prays that the verdict of the jury, and the judgment, be set aside and that he be granted a new trial herein.

RESPECTFULLY SUBMITTED,
MALCOM JOE DAVIS, Defendant
BY: DIXON L. PYLES, DAVID R. SMITH AND F. KENT STRIBLING, Attorneys for Defendant

BY: _____
Of Counsel

CERTIFICATE

I, _____, one of the attorneys for the defendant, Malcom Joe Davis, do hereby certify that I have on this day mailed, postage prepaid, a true and correct copy of the foregoing Motion for New Trial to Honorable Phillip Singley, District Attorney, P. O. Box 642, Columbia, Mississippi 39429.

This the _____ day of April, 1980.

_____
Attorney for Defendant

DIXON L. PYLES
Jackson, Mississippi
DAVID R. SMITH
Poplarville, Mississippi
F. KENT STRIBLING
Jackson, Mississippi

THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 52,659

MALCOLM JOE DAVIS

APPELLANT

V.

STATE OF MISSISSIPPI

APPELLEE

ASSIGNMENT OF ERRORS

The defendant-appellant, pursuant to Rule 6, assigns the errors of the Pearl River County Circuit Court in the paragraphs which follow:

I

The failure of the court to grant the defendant a speedy trial violated his constitutional rights under Amendment VI, which is made obligatory on the state by Amendment XIV; aggravated his mental condition because the prolonged incarceration prior to his trial was unduly oppressive; maximized his anxiety and concern which accompanied the public accusation of the appellant; and greatly impaired his ability to defend himself.

II

The conduct of the trial judge amounted to an intrusion into the jury's fact finding role; it structured the verdict of guilty; it relieved the state of establishing "beyond a reasonable doubt" the charge against the defendant in the indictment; and it shifted to the defendant the burden of persuasion of his innocence.

III

The defendant's rights under Amendments VI and XIV of the Constitution of the United States and under MCA § 15-5-2 (1975) were violated by the failure of the state to select the special venire from a fair cross section of the population of Pearl River County.

IV

The procurement, use and admission into evidence of the several involuntary confessions deprived the defendant of the essential elements of due process guaranteed by Amendment V; of the right to the effective assistance of counsel in violation of Amendment VI; and of the protection afforded by the "Mississippi Criminal Rules of Circuit Court Practice."

V

The constitutional rights of the defendant-appellant to be afforded a fair and impartial trial under Amendments V, VI, and XIV were abrogated by the action of the court:

(a) By refusing to grant a mistrial on the motion of the defendant when Mason Sistrunk, a witness for the state, purposely exhibited, displayed and exposed certain prejudicial objects to the jury before the objects were admitted into evidence, and thereafter when the state failed to offer the prejudicial objects into evidence denying the defendant the right to cross-examine the witness and procure testimony favorable to the accused.

(b) By refusing to grant a mistrial when the assistant prosecutor was allowed over objection to argue and comment on the failure of the defendant to testify in his own behalf.

(c) By refusing to grant the motion of the defendant to dismiss and discharge him at the conclusion of the state's case when the proof of the elements of the corpus delicti was wholly lacking, and again refusing at the conclusion of the trial to dismiss and discharge the defendant.

(d) By refusing to sustain the objections of the defendant to certain testimony of the state; and in sustaining the objections of the state to the evidence of the defendant.

VI

The court abused its discretion to the great prejudice of the defendant under the circumstances of this case in permitting Sheriff L. W. Holliday to serve as a baliff and remain

in the courtroom and hear the testimony of other witnesses and mingle with the other witnesses in the witness room; and in permitting him to testify over the objection of the defendant after all witnesses had been placed "under the rule" at the outset of the trial.

Dated: January 20, 1981

Malcolm Joe Davis
Defendant-Appellant

BY: _____
Of Counsel

BY: _____
Of Counsel

DIXON L. PYLES
Pyles & Tucker
507 East Pearl Street
Jackson, Mississippi 39201

F. KENT STRIBLING
309 Barnett Building
200 South President Street
Jackson, Mississippi 39201

DAVIS R. SMITH
Smith, Smith, Tate & Stuart
Post Office Box 393
Poplarville, Mississippi 39370

CERTIFICATE

The undersigned certifies that on the date set forth hereafter a true copy of the Assignment of Errors was personally delivered to:

Honorable William Allain
Attorney General of Mississippi
Gartin Building
Jackson, Mississippi

Dated: December 20, 1981

Dixon L. Pyles

11

§ 25-31-21. Pro tempore appointment and compensation of appointees.

If, at the time of impaneling the grand jury in any circuit court, the district attorney be absent or unable to perform his duties or, if after impaneling of the grand jury, the district attorney be absent or unable to perform his duties or be disqualified, the court shall forthwith appoint some attorney at law to act for the state in the place of the district attorney during his absence or inability or disqualification, and the person appointed shall have the power to discharge all the duties of the office during the absence or inability or disqualification of the district attorney, and shall receive a reasonable compensation for his services, to be allowed by the court and certified to the auditor, who shall issue his warrant therefor. Such allowance shall be deducted from the salary of the district attorney, and shall not exceed the amount of the salary of the district attorney for the number of days allotted by law for the term of the court at which such appointees shall act.

SOURCES: Codes, Hutchinson's 1848, ch. 65, art 11 (3); 1857, ch. 6, art 72; 1871, § 216; 1880, § 258; 1892, § 1559; 1906, § 1666; Hemingway's 1917, § 1403; 1930, § 4367; 1942, § 3924; Laws, 1898, ch. 58.

Cross ref...

15

§ 7-5-53. To assist district attorneys.

The attorney general shall, when required by the public service or when directed by the governor, repair in person, or by any regular or specially designated assistant, to any county or district in the state and assist the district attorney there in the discharge of his duties and in any prosecution against a state officer, and shall have the same right as the district attorney to enter the grand jury room while the grand jury is in session and to perform such services with reference to the work of the grand jury as the district attorney is authorized by law to perform.

SOURCES: Codes, 1892, § 184; 1906, § 190; Hemingway's 1917, § 3478; 1930, § 3674; 1942, § 3845.

DISTRIBUTED MAY 27 '82

ORIGINAL

NO. 81-6382

RECEIVED
MAY 26 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MALCOLM JOE DAVIS,
Petitioner

VS.

STATE OF MISSISSIPPI,
Respondent.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

MOTION TO DISMISS

BILL ALLAIN, ATTORNEY GENERAL
STATE OF MISSISSIPPI

BY: CATHERINE WALKER UNDERWOOD
SPECIAL ASSISTANT ATTORNEY GENERAL

and

BY: MARVIN L. WHITE, JR.
SPEICIAL ASSISTANT ATTORNEY GENERAL

OF COUNSEL

Post Office Box 220
Jackson, Mississippi 39205
(601) 354-7343

10

QUESTIONS PRESENTED

I. Where State Speedy Trial Act Is Not Intrepreted In Federal Constitutional Terms There Is No Substantial Federal Question And No Appellate Jurisdiction.

II. Were The Two Confessions Given By Appellant Properly Admitted At Trial?

III. Where Appellant Has Failed To Properly Preserve His Record For Review In the Court Below There Is No Substantial Federal Question For Review.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
JURISDICTION	1
STATEMENT OF THE FACTS	1
ARGUMENT	3
I. Where State Speedy Trial Act Is Not Interpreted In Federal Constitutional Terms There Is No Substantial Federal Question And No Appellate Jurisdiction	3
II. Were The Two Confessions Given By Appellant Properly Admitted At Trial?	6
III. Where Appellant Has Failed To Properly Preserved His Record For Review In The Court Below There Is No Substantial Federal Question For Review.	9
CONCLUSION	10
CERTIFICATE	11

TABLE OF AUTHORITIES

CASES	PAGE
Barker v. Wingo, 407 U.S. 514 (1972)----------	3,4
Cardinal v. Louisiana, 344 U.S. 437 (1969)----------	5
Carlisle v. State, 393 So.2d 1312 (Miss.1981)----------	4
Dover v. State, 227 So.2d 296 (Miss.1969)----------	6
Edwards v. Arizona, ___ U.S. ___,68 L.Ed.2d 378, 101 S.Ct. ____(1981)----------	7,8
Harvey v. State, 207 So.2d 108 (Miss.1968)----------	6
Henry v. Mississippi, 379 U.S. 443 (1965)----------	5,9
Lee v. State, 338 So.2d 399, (Miss.1976)----------	7
Loper v. State, 330 So.2d 265 (Miss.1976)----------	7
Ratliff v. State, 317 So.2d 403 (Miss.1975)----------	7
Shelton v. Kindred, 279 So.2d 642 So.2d 312 (Miss.1977)--	9
State v. Davis, 382 So.2d 1095 (Miss.1980)----------	4
Turner v. State, 383 So.2d 489 (Miss.1980)----------	4
United States v. Gray, 421 F.2d 316 (5th Cir.1970)-------	7
United States v. Halliday, 658 F.2d 1103 (6th Cir.1981)--	8
Williamson v. State, 330 So.2d 272 (Miss.1976)----------	6

STATUTES:

28 U.S.C. § 1257(2)----------	3
Miss. Code Ann. § 99-17-1 (Supp.1976)----------	3,4

NO. 81-6382

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MALCOLM JOE DAVIS,
Petitioner

VS.

STATE OF MISSISSIPPI,
Respondent.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

MOTION TO DISMISS

JURISDICTION

Appellant seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(2). Appellee would assert that jurisdiction does not lie as the Supreme Court of Mississippi has not intrepreted Section 99-17-1, Miss. Code Ann., (Supp.1976) in terms of the United States Constitution, but in state constitutional terms only. Certiorari jurisdiction is all that lies in the case and appellant's sham of using a statute does not change this.

STATEMENT OF THE FACTS

On the morning of Friday March 9, 1975, Carol Matherly was raped in her home in the secluded subdivision of Hideaway Estates. She was preparing to go to class at the local junior college after seeing her two children off to school. She was in her bedroom putting on her makeup when she heard the back door open. She put on her glasses and started to go investigate. At the bedroom door she met a man wearing stockings over his head and hands. A struggle insued. Her assailant told her to cooperate and be quite or he would hurt her. She believed him and said she would cooperate.

Davis put a pillow case over Mrs. Matherly's head forced her onto the bed and raped her. He ten led her to the bathroom, where he sat her on the toilet and made her take a douche. When this was complete he told Mrs. Matherly he was sorry. Davis fled, warning Mrs. Matherly to remain in the bathroom for fifteen minutes so he could make good his getaway.

When sufficient time had passed Mrs. Matherly dressed and drove to where her husband worked. Together they went to the police station and reported the rape. A statement was given and Mrs. Matherly was taken to her physician's office.

Mrs. Matherly was able to identify her assailant as Malcolm Joe Davis as he had been to her house on two previous occassions as a washing machine repairman.

Davis was taken into custody later in the day. He was initially questioned around 2:00 p.m. after his rights were given to him and he executed a waiver. He requested an attorney and questioning ceased. Davis was allowed to speak with his attorney over the telephone. Later Davis talked with the sheriff and a deputy and gave a confession after again being read his rights and executing a waiver, even though he had spoken to his attorney.

ARGUMENT

I. WHERE STATE SPEEDY TRIAL ACT IS NOT INTREPRETED IN FEDERAL CONSTITUTIONAL TERMS THERE IS NO SUBSTANTIAL FEDERAL QUESTION AND NO APPELLATE JURISDICTION.

Preliminarily appellee must state that this Court has no jurisdiction to hear this case as an appeal under 28 U.S.C. § 1257(2). 28 U.S.C. § 1257(2) states:

> By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Appellant attempts to invoke this jurisdiction by claiming that the validity Section 99-17-1, Miss. Code Ann. (Supp.1976), has been upheld in federal constitutional terms and is repugnant to that document. Without this sham, as we will show, the only jurisdiction this court can have is certiorari jurisdiction. In either case there is a lack of a substantial question as pertains to Section 99-17-1.

Section 99-17-1, Miss. Code Ann. (Supp.1976), is a state procedural statute dealing with speedy trial. The statute reads:

> Unless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned.

There is no federal constitutional requirement that a state have a statute concerning the issue of speedy trial. Where there is not state statute, the test applied for federal constitutional purposes would be the one set forth in Barker v. Wingo, 407 U.S. 514 (1972).

The fact that the Mississippi Legislature enacted a state "speedy trial" act that only applied to the time period between arraignment and trial is not repugnant to the federal constitution.

The intrepretation of this statute is simply a matter of state law over which the State Supreme Court has exclusive jurisdiction. The court below has not intrepreted this statute in a federal constitutional context. In fact the Supreme Court of Mississippi has used the Barker v. Wingo, standard where the period of time between indictment and arraignment have been of any consequence as they did in the case at bar. SEE ALSO: Carlisle v. State, 393 Sol2d 1312 (Miss.1981); Turner v. State, 383 So.2d 489 (Miss. 1980); State v. Davis, 382 So.2d 1095 (Miss.1980). The state met its burden under Section 99-17-1 as Davis was tried in less than 150 days. It is clear, no substantial federal question concerning Section 99-17-1 has been presented that can be addressed under the obligatory appellate jurisdiction of this Court or the discretionary certiorari jurisdiction.

The only issue this Court could have before it for adjudication is the state supreme court's application of Barker v. Wingo, 407 U.S. 514 (1972), and that only by certiorari jurisdiction. The court below properly applied the four pronged balancing test set forth in Barker. The four factors to be considered in this balancing test are:

1. Length of delay.
2. Reason for delay.
3. The defendant's assertion of his right.
4. Prejudice to the defendant.

We find from the record that the total lapsed time between indictment, on March 16, 1979, and trial, on April 10, 1980, was 388 days.

The delay from the March 1979 Term to the November 1979 Term was occasioned by appellant's request for a complete psychological examination. The delay from the November 1979 Term until the April 1980 Term was because of a continuance granted the State because the District Attorney was was authorized no assistants under the existing law was required to be before the grand jury for the entire three week term. The delay was reasonable and constitutionally permissible. There is no substantial federal question presented here.

Tangentially appellant's raised questions concerning the authority to appoint assistant district attorneys, have the attorney general intervene or require the county attorney try the case are without merit here as they have never been presented to the Mississippi Supreme Court. It is well established that this Court will not decide issues raised for the first time, Cardinale v. Louisiana, 344 U.S. 437 (1969) and will not review an issue even though it contains a federal question if there is an adequate State ground that supports the decision of the court. Henry v. Mississippi, 379 U.S. 443 (1965)

II. WERE THE TWO CONFESSION GIVEN BY APPELLANT PROPERLY ADMITTED AT TRIAL.

This issue can be proper for determination only by this Court through its discretionary certiorari jurisdiction not by way of appeal jurisdiction as appellant attempts to assert.

The appellant claims his two confessions were improperly introduced against him at trial thus were Appellant did not take the stand to cite any irregularities in his interrogation during the hearing on the motion to suppress. His only witness was a clinical psycholigist, Dr. Cox, who testified that appellant's will to succeed in this attempt to show involuntariness through some psychological disorder appellant had the burden of meeting the test laid down in Williamson v. State, 330 So.2d 272, 276 (Miss.1976):

> [A] confession will not oridinarily be excluded merely because the person making the confession is mentally weak. Until it is shown that a weak-minded person has divulged that which he would not have divulged had he not been overreached, his voluntary confession is admissible. In Lynum v. Illinois, 372 U.S. 528, 534, 83 S.Ct. 917 920, 9 L.Ed.2d 922,926 (1963), that Court said: "We have said that the question in each case is whether the defendant's will was overborne at the time he confessed."
> [emphasis supplied]

This burden was met by the defendants in both Dover v. State, 227 So.2d 296 (Miss.1969), and Harvey v. State, 207 So.2d 108 (Miss. 1968). A quick look at the facts of those cases, in contrast to the facts presented here, clearly shows that Malcolm Davis was not "overreached." In Dover,the defendant had an I.Q. of 60! And in Harvey, the defendant not only had an I.Q. of 60, he had the mental age of a five year-old!

Here, the psychologist testified that Malcolm Davis had an I.Q. of between 91 and 109, which is normal. And, there were no signs of "organic neurological impairment." The appellant, therefor, is not a "mentally weak" person.

The psychologist did testify that the appellant suffered from anxiety and that he had a "paranoid" and "sociopathic" personality.

It is well-settled that the trial judge must determine the voluntariness of the confession from the totatlity of the circumstances. Lee v. State, 338 So.2d 399, 401 (Miss.1976); Ratliff v. State,317 So.2d 403 (Miss.1975). And, where the defendant claims to have lacked the mental capacity to exercise his will during an interrogation, the determination by the trial court "must necessarily be given great weight." Lee v. State, supra, 338 So.2d at 401. He was in the best position to consider appellant's conduct and capacity, and to observe his demeanor. He is not bound by the psychologist's testimony, United States v. Gray, 421 F.2d 316, 318 (5th Cir. 1970), and his conclusion may not be set aside unless it is manifestly erroneous. Lee v. State, supra; Loper v. State, 330 So.2d 265, 268 (Miss.1976).

The trial court held an extensive hearing on the Motion to Suppress. He observed the appellant over long days of trial. He was in the best position to determine, for example, whether Dr. Cox (the defendant has an I.Q. of between 91-109, but when under stress, his mind is "scrambled eggs"), was to be believed, or whether Sheriff Holliday, ("the man seemed too intelligent"), was to be believed.

The second prong of appellant's attack is the question of whether his confessions were obtained in violation of Edwards v. Arizona, ___ U.S. ___, 68 L.Ed.2d 378, 101 S.Ct. ____ (1981).

As stated by the court below there are parallels between the case at bar and Edwards factually. However the distinctions are even greater. Edwards was never afforded the opportunity to confer with counsel. Davis' attorney, Rex Jones, was telephoned and Davis spoke with him upon request. Questioning ceased.

Edwards told the officers he did not want to talk with anyone and was told that he must talk with them. Davis on the other hand told the Sheriff he had spoken to his attorney and was still willing to talk. The only true factual similarity is the fact that the second interrogation was initiated by the law enforcement officers.

As required in Edwards there was the discreet inquiry into voluntariness and a knowing and intellegent waiver. 406 So.2d at 800.

The situation at bar more closely parallels the case of United States v. Halliday, 658 F.2d 1103 (6th Cir. 1981). In Halliday the Sixth Circuit said:

> In Edwards, the defendant was arrested on a state criminal charge and questioned by the police until the defendant said he wanted an attorney. Questioning then ceased, but the police resumed interrogation the next morning without providing the defendant with counsel. The defendant after being informed of his Miranda rights stated that he was willing to talk, and confessed to the crime. The Supreme Court held that the use of this confession against the defendant at trial violated his right to have counsel present during custodial interrogation. The Court rejected the argument that the defendant waived his right by his response to the second police-initiated interrogation. It held that once an accused expressed a desire to deal with the police only through counsel, he is not subject to further interrogation until counsel has been made available to him, unless the accused has himself initiated further communications with the police.
>
> Edwards emphasizes the necessity of counsel being made "available" or of the defendant having "access" to counsel, 451 U.S. 484-87, 101 S.Ct. at 1885, 1886, rather than holding that once the accused requests counsel he may thereafter be questioned only in the presence of counsel. Here Gallagher had access to two attorneys. Court appointed counsel was made available to him, and in addition he retained and spoke with private counsel. Thus the FBI did not impermissibly initiate a second interrogation after defendant requested counsel.

(Emphasis added) 658 F.2d at 1104-1105.

III. WHERE APPELLANT HAS FAILED TO PROPERLY PRESERVE HIS RECORD FOR REVIEW IN THE COURT BELOW THERE IS NO SUBSTANTIAL FEDERAL QUESTION FOR REVIEW.

Appellant claims that a comment made by the assistant district attorney amounted to a comment on the failure of him to testify. The court below held that appellant had not presented a sufficient record on which they could determine the merits of his question. Appellant filed no bill of exceptions nor did he have closing arguments transcribed as a part of the record on appeal. There was a procedural waiver under state law by not presenting a sufficient record for review. Shelton v. Kindred, 279 So.2d 642 So.2d 312 (Miss.1977). This Court will not review an issue even though it contains a federal question if there is an adequate state ground that supports the decision of the state court. Henry v. Mississippi, 379 U.S. 443 (1965). Certainly the failure to present a record sufficient for determination of the issue is adequate state grounds as the court below found.

Appellant had access to his attorney as did Halliday and the Sheriff did not impermissibly initial a second interrogation after Davis requested counsel. Davis was afforded to counsel what his counsel advised him to do has never come out as appellant has never taken the stand even preliminarily to tell us, which is his right. Appellant's confessions were voluntary and there was no violation of Edwards.

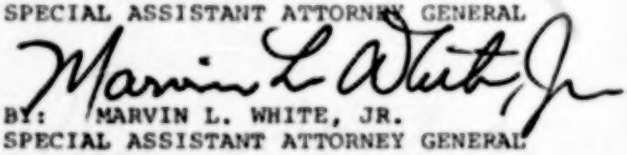
CONCLUSION

For the reasons stated above the appeal should be dismissed or if treated as a petition for certiorari it should be denied.

Respectfully submitted,

BILL ALLAIN, ATTORNEY GENERAL
STATE OF MISSISSIPPI

BY: CATHERINE WALKER UNDERWOOD
SPECIAL ASSISTANT ATTORNEY GENERAL



BY: MARVIN L. WHITE, JR.
SPECIAL ASSISTANT ATTORNEY GENERAL

OF COUNSEL

Post Office Box 220
Jackson, Mississippi 39205
(601) 354-7343

STATE OF MISSISSIPPI

COUNTY OF HINDS:

I, Catherine Walker Underwood, a member of the Bar of this Court, having been duly sworn, do hereby state that to my knowledge the original and ten (10) copies of the Motion to Dismiss in No. 81-6382, Malcolm Joe Davis v. State of Mississippi were deposited in the United States Post Office in Jackson, Mississippi 39205 on May 24, 1982 a date within the time permitted by this Court for the same. The above was mailed, first class postage prepaid, to the Honorable Michael Rodak, Clerk, United States Supreme Court, Washington, D. C. 20542.

Catherine Walker Underwood
SPECIAL ASSISTANT ATTORNEY GENERAL

SWORN TO and SUBSCRIBED before me this the 24th day of May, A.D., 1982.

Carolyn B. Robertson
NOTARY PUBLIC

My Commission Expires July 6, 1983